UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re: FIRSTENERGY SOLUTIONS, CORP., *et al.*,[1] Debtors	Chapter 11 Case No. 18-50757 (Jointly Administered) Hon. Judge Alan M. Koschik

OHIO CONSUMERS' COUNSEL'S STATEMENT THAT FES'S PROPOSED THIRD-PARTY, NON-CONSENSUAL RELEASE IN ITS SECOND AMENDED PLAN FAILS TO SATISFY THE LEGAL STANDARDS FOR APPROVAL AND RISKS HARMING CONSUMERS [DKT. NOS 2119, 2120, 2121, 2310, AND 2313]

I. Introduction

Debtors FirstEnergy Solutions Corp., FirstEnergy Nuclear Operating Company, and their affiliated debtors and debtors in possession (collectively, "FES") are seeking approval of a disclosure statement for a second amended chapter 11 plan. The Second Amended Plan provides for an unduly and extraordinarily broad release that unfairly exposes the general public to financial risk. The release's design would shield FirstEnergy Corp. and its nondebtor affiliates (collectively, "FirstEnergy") from future liability. Under the release, FirstEnergy would be shielded from any claims or causes of action related in any way to the Debtors' businesses and property, including from any liability for the costly decommissioning of its power plants. Second Amended Plan § VIII.E (Document Number 2310) at 100, 102 (related injunction).

[1] The FirstEnergy Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: FE Aircraft Leasing Corp. (9245), case no. 18-50759; FirstEnergy Generation, LLC (0561), case no. 18-50762; FirstEnergy Generation Mansfield Unit 1 Corp. (5914), case no. 18-50763; FirstEnergy Nuclear Generation, LLC (6394), case no. 18-50760; FirstEnergy Nuclear Operating Company (1483), case no. 18-50761; FirstEnergy Solutions Corp. (0186); and Norton Energy Storage L.L.C. (6928), case no. 18-50764. The Debtors' address is: 341 White Pond Dr., Akron, OH 44320.

At the hearing on March 19, 2019, the Court asked FirstEnergy's counsel if the release would protect it from claims related to its previous ownership of properties now owned and operated by FES. In response, FirstEnergy's counsel Thomas Wearsch stated "I can give everyone a very simple answer, which is in the example that was just given of a facility that was formerly owned by a FirstEnergy Corp., a non-Debtor FE Corp entity, that is now owned by the Debtors, that would be a released claim." March 19, 2019 Hearing Transcript at 258:4-9.

The Office of the Ohio Consumers' Counsel ("OCC")[2] is concerned for Ohio consumers that the non-consensual release in Section VIII.E of the Second Amended Plan, in combination with the Plan's other provisions, shields FirstEnergy from too much liability and leaves Ohioans with too little protection. In this regard, the release could shield FirstEnergy from future claims related to power plant decommissioning costs (on power plants it formerly owned) or from its contractual obligations to the Ohio Valley Electric Corporation ("OVEC").

In other words, the Plan allows FES's future equity holders (owners) to enjoy the upsides of any future improvement in FES's operations while they shed certain downside risks that could instead be ultimately imposed upon Ohioans. Were funds for decommissioning to be inadequate, for example, consumers or taxpayers might be (unfairly) called upon to fund FirstEnergy and FES's power plant decommissioning liabilities to federal and state governments. Under FES's own Plan these decommissioning events will stretch for at least 60 years into the future.[3] Even FES concedes that its projected decommissioning costs for power plants and related

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[2] OCC is the statutorily designated representative for residential utility consumers in Ohio. These consumers include customers whose FES electric marketing contracts are to be assigned to the "Newco" as part of the proposed Second Amended Plan and who may be required to fund any future shortfall in FES's ability to pay for power plant decommissioning costs.

[3] Detail regarding these costs and that the decommissioning of the nuclear plants would stretch over sixty years was additional information first provided in the Second Amended Disclosure Statement (Docket No. 2313) first filed on March 17, 2019.

environmental liabilities exceeds $2 billion. *See* Second Amended Disclosure Statement (Docket No. 2313) at 53. FES's Plan provides no trust, reserve, or other protection to ensure payment of of its power plant decommissioning costs and environmental liabilities. Without such a mechanism, the Plan's proposed release makes the funding of these costs more uncertain than they otherwise should be. It does this by protecting FirstEnergy from claims related to its operation of the power plants that it owned and operated for many, many years prior to transferring them to FES.

As described in the OCC's prior objection to the First Amended Disclosure Statement, Ohio consumers have a strong interest in the adequate funding of the decommissioning costs. Ohio consumers (or (possibly taxpayers) could very likely bear much of the burden of any underfunding. That concern is based on the history of the Public Utilities Commission of Ohio ("PUCO") requiring customers to pay environmental remediation costs. In one case, it imposed at least $55 million in costs on customers for the clean-up of manufactured gas power plants that had been out of service for over fifty years.[4]

OVEC also referenced in its statement on the proposed FES disclosure statement that the Plan's nonconsensual third-party release could release its claims under the power purchase agreement between it and FirstEnergy Corporation's nondebtor affiliates Allegheny Energy Supply Company, LLC ("AES") and Monongahela Power Company ("Monongahela"). *See* Statement (Docket Number 2271) at 3. If the Plan releases allow AES and Monongahela to walk away from their funding obligations for OVEC, Ohio distribution customers of AEP Ohio, Duke

[4] *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas Rates,* PUCO Case No. 12-1685-GA-AIR, et al. Opinion and Order at 77 (November 13, 2013). A Link to the PUCO's Order is: http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=14678951-de5e-4483-a2d0-e478e71aa277

Energy Ohio and DP&L could be forced to pay for the shortfall. They would pay this shortfall through retail charges imposed by PUCO that customers could not avoid of any OVEC-related costs not covered by revenues from selling OVEC generated electricity into the PJM market.[5]

OVEC also referenced in its statement a release of a guaranty by FirstEnergy of OVEC-related obligations for its affiliates. *See* Statement (Docket Number 2271) at 3 fn. 4. To the degree that OVEC, under the guarantee, could recover against FirstEnergy for obligations related to FES's rejection of its power purchase agreement with OVEC, any release of the guarantee could harm Ohio consumers. The harm to consumers results from increasing the amounts they are required to pay to fund OVEC's losses under PUCO-approved charges.

But FES's shifting of liabilities through nonconsensual, third-party releases fails as a matter of law to meet the narrow instances where they can be approved in this Circuit. The Sixth Circuit has held that "enjoining a noncreditor's claim is only appropriate in 'unusual circumstances.'" *See In re Dow Corning Corp.*, 280 F.3d. 648, 658 (6th Cir. 2002). FES claims that the release of FirstEnergy in the Second Amended Plan satisfies the stringent "unusual circumstances" test in *Dow Corning.* FES is wrong. The Second Amended Plan actually fails to satisfy at least two prongs of the test articulated in *Dow Corning* and is therefore unconfirmable. As such, the OCC considers approval of this Disclosure Statement, and the subsequent proceedings through a confirmation hearing, as wasteful and unproductive when parties in interest should be focusing their undivided attention on negotiating a confirmable plan.

II. Argument

A. As a Matter of Law and Consumer Protection, the Second Amended Plan Fails to Meet the Seven Factors of the *Dow Corning* Test Required to Release

[5] PJM Interconnection, LLC is a regional transmission organization authorized by FERC to administer wholesale energy, capacity, and ancillary services markets through all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and the District of Columbia.

FirstEnergy from its Obligation to Pay Decommissioning Costs or OVEC Related Costs – and Thus the Current Proposed Plan is Unconfirmable

The Sixth Circuit's opinion in *Dow* is clear and unambiguous:

> We hold that **when the following seven factors are present**, the bankruptcy court may enjoin a non-consenting creditor's claims against a non-debtor: (1) There is an identity of interests between the debtor and the third-party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions.

Dow Corning, 280 F.3d at 658 (emphasis added, citations omitted). The Sixth Circuit does not talk about a "majority," a "predominance," or a "weighing" of the factors. Rather, it requires that "the following seven factors are present." *Id.* Thus, to satisfy the unusual circumstances test, "at least in the Sixth Circuit, all of the factors must be present and all the factors are important." *In re SL Liquidating, Inc.*, 428 B.R. 799, 802 (S.D. Ohio 2010). On remand, the District Court in *Dow Corning* agreed that all seven factors must be satisfied, and approved Dow Corning's plan only after making detailed factual findings on how each factor was satisfied. *See Dow Corning*, 287 B.R. at 402-16

As articulated by the Court at the hearing on March 19, 2019, the application of many of the *Dow Corning* factors is factually intensive and not within the proper scope of the hearing on April 2, 2019. A review of just the Plan itself, however, reveals that the fifth factor (a mechanism for payment of all or substantially all of the claims covered by the injunction) and

sixth factor (a mechanism for creditors who do not settle to recover in full) are not satisfied without the need for the Court to consider additional evidence.[6] The Plan's treatment of power plant decommissioning costs shows how the Plan fails on these issues as a matter of law.

The Plan provides no special mechanism to fund decommissioning costs. The sole security for these decommissioning obligations are the nuclear decommissioning trusts and the surety bonds securing certain coal related obligations. This Plan, for example, lacks the special trust set up to pay the claims subject to the injunction that was present in Dow Corning's confirmed plan. *See Dow Corning*, 287 B.R. at 414-15.

Instead, the Second Amended Plan leaves any additional decommissioning costs as a general obligation of the reorganized debtors or "New FES." These entities are supposed to exit the power generation business by 2023. *See* 2nd Amended Disclosure Statement Ex. D at 4 (Docket No. 2313-4) ("None of the Debtors' generating units are assumed to clear megawatts in the 2022/2023 Planning year."). After that date, New FES's sole source of revenue will be as a retail business. *See id.*[7] No plan provision requires New FES to continue the retail business even until 2023. Thus, there is no guarantee that there will be any additional funds available to

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[6] Arguably, the fourth factor requiring "overwhelming acceptance" of the plan cannot be satisfied where the governmental environmental agencies, which are objecting based on the New FES's (and other related parties') future compliance with legal obligations, are an impacted class, but are not entitled to vote on the Plan.

[7] While not properly subject of the April 2nd hearing, the OCC would note that the Financial Projections for the Retail business attached to the disclosure statement make the implausible assumption that FES's retail electric business will increase sales from 27 terawatt hours in 2019 to 48 terawatt hours in 2023. This represents an increase of sales of over 75% in five years. *See* 2nd Amended Disclosure Statement Ex. D Financial Projections at 4. This results in projected EBITDA for the retail business of $69 million in 2023. *See id.* at 9. This projection is either the classical hockey-stick fantasy or a cover for real projections based on FES's current requests for subsidies for its nuclear plants in Ohio and Pennsylvania being approved. If the prospects for the retail business were actually this rosy without subsidies, one would have expected Exelon to offer more than the $140 million for the business or the sale auction would have attracted alternative bids.

pay the decommissioning costs for FES's nuclear and coal plants beyond the existing trusts and surety bonds. This funding gap is particularly acute for FES's nuclear plants which it proposes to place in a "SAFSTOR" status where decommissioning could take place over 60 years or more. *See* 2nd Amended Disclosure Statement (Document No. 2313) at 46. Similarly, the Plan fails to provide a mechanism for recovery of OVEC's asserted claims against FirstEnergy related to the power purchase agreement between it and AES and Monongahela or on the guarantee by FirstEnergy of OVEC-related obligations.

FES's claim on pages 25 and 26 of its omnibus reply that the "all or substantially all" factor is satisfied because "recoveries would be substantially diminished" if FirstEnergy terminated its settlement with FES misinterprets that factor. In *Dow Corning*, the Sixth Circuit found that this factor was not met where the plan failed to provide "an opportunity for those claimants who choose not to settle to recover in full" as the plan risked not paying the United States government claims after those of unsecured creditors. *Dow Corning*, 280 F.3d at 659. This was so even though Dow Corning and its insurers provided a $2.35 billion settlement fund for claims in that case which is akin to the consideration provided by FirstEnergy's settlement in this case. *Id.* at 654-55. The Court in *SL Liquidating* overruled a similar argument by pointing out that "[t]he Debtors have merely restated the best interest of the creditors test of 11 U.S.C. § 1129(a)(7), which is a prerequisite to confirmation which must be satisfied in every chapter 11 case." *SL Liquidating,* 424 B.R. at 804. Nothing in *Dow Corning* suggests that "all or substantially all" is synonymous with the best interest of creditors test. That the FirstEnergy settlement improves the recovery of unsecured creditors or even provides a better balance sheet for the reorganized debtor going forward does not satisfy the "all or substantially all" fifth factor.

The Plan also fails the sixth factor requiring that a plan provide for creditors who choose to litigate their claims rather than to settle the opportunity to recover in full. Currently, federal

and state governments face no impediment in pursuing either FES or FirstEnergy for decommissioning or environmental costs related to their power plants. Under the Plan, however, they lose their opportunity to recover against FirstEnergy's billions of dollars in assets. The Plan does not address the governments' future claims and FES could foreseeably distribute the proceeds and all of its assets to other creditors and equity holders years in advance of when the governments' decommissioning claims come due. The Plan also lacks the procedural mechanisms prescribed in *Dow Corning* to protect the government claims from this risk.

Although FirstEnergy, FES, and the plan proponents would like the decommissioning liabilities to disappear through the third-party release and injunction, the liabilities do not magically disappear in reality. By erecting a robust release and injunction wall to defeat any recovery on underfunded future decommissioning claims, the Plan undermines and arguably disregards the sixth factor.

The Sixth Circuit in Dow Corning recognized the risk of abusive third-party releases when it required satisfaction of all seven factors to ensure that such releases were reserved for truly unusual circumstances. Those circumstances are necessarily rare. They are also not present here. Without any mechanism to provide for recovery in full if the governments litigate their future claims, now existing or in the future, the Plan is uncomfirmable. FES must provide a mechanism for recovery that ensures payment of these claims beyond the existing decommissioning trusts and surety bonds.

B. FES is Incorrect that Decommissioning and OVEC-related Claims against FirstEnergy Can Be Released Without Satisfying All Seven Dow Corning Factors

In its Omnibus Reply, FES makes the contrary claim that not all of the *Dow Corning* factors must be satisfied for the "unusual circumstances" to exist that make it possible for a bankruptcy court to approve a nonconsensual, third-party release. *See Omnibus Reply*, at 26-27.

In doing so, FES ignores the plain language in *Dow Corning* discussed earlier mandating that all seven factors must be present, and mostly relies on authority outside of the Sixth Circuit. The two readily distinguishable, in-circuit cases cited by FES are *In re City of Detroit,* 524 B.R. 147 (E.D. Mich. 2014) and an unpublished decision from another judge in this District in *Akron Thermal, Limited Partnership*, Case No. 07-51884 (January 26, 2009). *See* Omnibus Reply at 27. Neither of those opinions are persuasive. Neither opinion, for instance, explains how *Dow Corning*'s "when the following seven factors are present" language could mean anything other than all seven factors to be present. Moreover, both opinions rely on the fact that the debtors were not traditional corporations in a chapter 11 case when they modified the *Dow Corning* test.

In *Detroit*, the Court focused on the fact that the case was proceeding under chapter 9 of the Bankruptcy Code and relied on an out-of-circuit bankruptcy court decision in *In re Connector Ass'n, Inc.*, 447 B.R. 752, 767 (Bankr. D.S.C. 2011) (where *Dow Corning* is not binding precedent) to hold that the *Dow Corning* factors could be applied differently in a chapter 9 case. *See Detroit*, 524 B.R. at 173-74. The *Detroit* opinion does not provide authority for extending its weighing of the factors analysis outside of the unique world of chapter 9 cases. Any argument that the *Detroit* weighing analysis extends to chapter 11 cases would directly contradict *Dow Corning*, binding circuit precedent decided in the chapter 11 context involving a corporation like this case.

FES also points to the unpublished decision in *Akron Thermal*. But that decision relies on non-Sixth Circuit law to hold that not all of the *Dow Corning* factors must be satisfied in a case involving a partnership where the proposed injunction covered *completely unknown* claims against *partners*. *See Akron Thermal. at* 61-62. That is far different from this case. FES is not a partnership and the proposed nonconsensual, third-party release and injunction defeats *known and anticipated* future decommissioning obligations. Seriously, FES omits any mention of the

EPA's agreed order and carveout from the third-party release provision in *Akron Thermal* such that the third-party release did not cover ***any*** environmental obligations to the EPA and thus posed none of the serious harms to the public by the proposed injunction in this case. *See In re Akron Thermal, Ltd. P'ship* Case No. 07-51884 (Docket No. 536) (Bankr. N.D. Ohio E.D. Oct. 09, 2018) at 2 (copy attached as Exhibit A).

FES's invitation to deviate from *Dow Corning*'s seven-factor test fails. Both the *Detroit* and *Akron Thermal* cases are highly distinguishable, and in the case of *Akron Thermal*, the third-party release did not release the EPA's environmental claims.

III. Conclusion

The Sixth Circuit's *Dow Corning* test of "unusual circumstances" requires satisfaction of all seven factors for approval of any third-party release and injunction, such as what FES proposes. As a matter of law, the Second Amended Plan fails to meet the fifth and sixth factors of that test and risks imposing significant harm on Ohio consumers through failing to guarantee decommissioning funds and possibly allowing FirstEnergy to shed its OVEC-related liabilities. Accordingly, this Court should deny approval of the Second Amended Disclosure Statement and parties in interest should focus their efforts on negotiating a revised plan that satisfies the standards for confirmation and does not risk harm to the public in this manner.

Dated: March 26, 2019
Columbus, Ohio

Respectfully submitted,

/s/ David A. Beck

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ATTORNEYS FOR OFFICE OF THE OHIO CONSUMERS' COUNSEL IN THEIR POSITION AS SPECIAL COUNSEL FOR THE OHIO ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was electronically filed on March 26, 2019 and served through the Court's electronic filing system and on the General Service List via email based on the listing posted on Prime Clerk's website as of the filing of this notice.

/s/ David A. Beck
One of the Attorneys for the Special Outside Counsel for the Office of the Ohio Consumers' Counsel

Exhibit A

IT IS SO ORDERED.

Dated: 09:16 AM January 26 2009

MARILYN SHEA-STONUM
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	
	)	**Chapter 11**
AKRON THERMAL, LIMITED PARTNERSHIP,	)	
	)	**Case No. 07-51884**
	)	
Debtor and Debtor-in-Possession.	)	**Chief Judge Marilyn Shea-Stonum**
	)	
		OPINION RE: CONFIRMATION OF MODIFIED SECOND AMENDED PLAN OF REORGANIZATION

OVERVIEW*

It is not unusual for a Chapter 11 case to bring to the surface long simmering conflicts.

* Unless otherwise specified, capitalized terms and phrases used herein have the meanings assigned to them in the Plan (defined herein). In addition, any term used in this Confirmation Order that is not defined in the Plan or this Confirmation Order, but that is used in the Bankruptcy Code or the Bankruptcy Rules, shall have the meaning given to that term in the Bankruptcy Code or the Bankruptcy Rules, as applicable.

As this Court addresses the evidence from the contested Confirmation Hearing in this case, it is useful to list some of the conflicts that predated this bankruptcy case because some or all of the parties, at different times and in various contexts, have suggested or argued such conflicts need to be resolved as a precondition to or part of the confirmation proceedings:

1. Environmental issues dating back to 1995;
2. The condition of the Leased Premises (as defined below) after a fire that occurred in 2000;
3. Repayment of advances made by the City of Akron ("City") to the Debtor in 1999 and 2005;
4. The condition of the Leased Premises as of the commencement of the Lease so as to determine the Debtor's maintenance obligations; and
5. The rights of various customers of the Debtor under contracts of various durations.

Were one to detail each of the separate controversies that have simmered, one could easily identify a dozen or more situations that have or could have been the subject of a separate lawsuit. Notably however, none of these controversies resulted in the filing of lawsuits prior to the commencement of this chapter 11 case. The fact that the Debtor's general partner, and, thus, the management of the Debtor changed as of December 24, 2004 does not simplify the resolution of any of these issues. While the intentions of the Debtor's prior general partner were never clearly developed on the record in this case, one fact is undisputed: It did not cause the Debtor to pay any of the monies that it owed to the City and allowed the Debtor to be grossly delinquent to a number of its major creditors. If these controversies are relevant to confirmation of Debtor's plan, they are addressed in this Opinion as they pertain to confirmation requirements. Some are relevant to the bankruptcy case, though properly addressed in other procedural frames.

After the current general partner assumed management and prior to the filing of this case, the delinquency in payments to major creditors continued, although in the context of significant operational improvements, including the development of a more cost-efficient fuel mix and debt composition proposals that did not win creditor approval.

The Debtor reacted to a notice that the City intended to terminate its Lease by filing this case. In short, the Debtor's relations with the City, as its lessor, and other major creditors were deeply troubled. Throughout this case, the City's stance toward the Debtor has shown no apparent softening. Working to gain the support of the Official Committee of Unsecured Creditors (the "UCC") and other skeptical parties in interest, the Debtor filed a plan of reorganization that assumed continuing opposition from the City. After exploring other possible resolutions of the case with a variety of parties in interest, including the City, the UCC actively supported confirmation of the Debtor's Amended Plan of Reorganization. Because at least one class of creditors failed to accept the Plan and the City's objections to confirmation were not resolved on a consensual basis, the Debtor and the UCC sought to demonstrate that the Plan could be confirmed pursuant to 11 U.S.C. § 1129(b).

I. PROCEDURAL HISTORY OF THE CASE

A. Bankruptcy Filing

On June 18, 2007, Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtor continues to operate its business and manage its properties as a debtor in possession pursuant to 11 U.S.C. §§ 1107 and 1108.

B. The Plan Process

1. Exclusivity

The exclusive period for the Debtor to file a plan was due to expire on October 16, 2007

and the exclusive period to solicit acceptance of such plan was due to expire on December 17, 2007. Upon motions by the Debtor the exclusive period was extended to March 15, 2008. [docket ## 190, 213, 260 and 337]

2. Assumption Motions

On October 15, 2007, Debtor filed a Motion for Approval of Assumption of the Unexpired Operating Lease Agreement with the City (the "Lease Assumption Motion"). [docket # 206] On October 16, 2007, Debtor filed a Motion for Approval of Assumption of Any and All License Agreements with the City and the Franchise Ordinance Ancillary to the Unexpired Operating Lease Agreement (the "License and Franchise Assumption Motion," together with the Lease Assumption Motion, the "Assumption Motions"). [docket # 208] On November, 15 2007, the City filed its Objection to the Assumption Motions. ("City's Assumption Objection")[docket #232]. The Court held evidentiary hearings on the Debtor's Assumption Motions and the City's Assumption Objection on January 14, 15, 31 and February 1, 19, 22, March 5 and 7, 2008 ("Assumption Hearings"). On April 25, 2008, the Court entered a Partial Opinion on the Lease Assumption Motions (the "Partial Opinion"). [docket # 390].

During the Assumption Hearings, the Debtor and the City presented evidence on the issue of Debtor's ability to provide the City adequate assurances, pursuant to 11 U.S.C. §§ 365(b)(1)(A) and (C). The Court did not make a final determination on the adequate assurance issue in the Partial Opinion, instead finding that the feasibility and adequate assurance issues would be handled together in the confirmation process. (*See* Partial Opinion, p. 3). Accordingly, the primary matters left for determination in conjunction with confirmation of the Plan were whether Debtor will have adequate capital to (a) make the monetary cure payments identified in [the Partial Opinion]; (b) perform its future obligations under the Lease; (c) return a dividend to

the unsecured creditors in this case; (d) meet the Debtor's operational expenses; and (e) satisfy other plan obligations under Section 1129 of the Bankruptcy Code. (Partial Opinion p. 3).

On July 11, 2008, the City filed a Motion to Modify the Partial Opinion to reflect the U.S. EPA's rejection of Debtor's proposal to resolve the Boiler 32 issue. [docket #458] On July 24, 2008, Debtor filed a brief in opposition to the City's Motion to Modify the Partial Opinion. [docket #471] On August 12, 2008, the City filed a Motion to Modify the Debtor's Motion for Approval of Assumption of the Unexpired Operating Lease Agreement Regarding Fire Damage to the Roof of the RES Steam. [docket #483] On August 25, 2008 the Debtor filed its Objection to the City's Motion to Modify Regarding Roof Issues. [docket #512] The City's Motion to Modify Regarding Roof Issues requested that the Court modify the Partial Opinion to reflect Debtor's failure to repair and maintain the Roof of the RES Steam Plant resulting from fire damage that occurred on October 12, 2000.

3. Debtor's Proposed Disclosure Statement, Chapter 11 Plan of Reorganization, Responses and Objections

On March 20, 2008, i.e., five days after the expiration of its exclusivity period, Debtor filed its initial Plan of Reorganization. [docket # 366] On May 9, 2008, Debtor filed its First Amended Plan of Reorganization for Akron Thermal, Limited Partnership [docket # 405] and initial Disclosure Statement. [docket # 406] On June 30, 2008, the City filed its objections to that initial Disclosure Statement. [docket # 449] The UCC filed its Comments and Limited Objection to the initial Disclosure Statement. [docket #448] On July 11, 2008, the Debtor filed Debtor's Responses to the Objections to Disclosure Statement. [docket #456] Additional objections regarding the Debtor's proposed Disclosure Statement were file on July 17, 2008 [docket #463] and on July 23, 2008 [docket #467].

On July 23, 2008, both Debtor and the UCC responded to the City's First Amended Objection to Debtor's First Amended Disclosure Statement. [docket ## 469 and 468, respectively] The Court approved Debtor's First Amended Disclosure Statement on July 25, 2008 ("Order Approving First Amended Disclosure Statement") [docket #474]

4. Second Amended Plan and Objections

On July 28, 2008, Debtor filed its Second Amended Plan of Reorganization ("Plan") dated July 14, 2008 [docket #472], its First Amended Disclosure Statement for Debtor's Second Amended Plan of Reorganization dated July 14, 2008 [docket #473], and the form of notice that it was using to communicate to parties in interest (1) the approval of Disclosure Statement; (2) hearing date scheduled to address Plan confirmation; (3) the deadline and procedures for filing objections to confirmation of Plan; and (4) the voting deadline for receipt of ballots" [docket # 475]. The Confirmation Hearing was scheduled to commence on Monday, August 25, 2008.

5. Overview of Classification of Claims and Interests and Ballot Results

a. Classes of Claims and Interests in Plan

Article III of the Plan separates claims and interests into four (4) basic classes. (*See* Plan at p. 13-14.) The classes are as follows:

Class 1

Class 1.1	Secured Claim of Summit County for Public Utilities Personal Property Tax
Class 1.2	Secured Claim of The University of Akron
Class 1.3	Secured Claim of Thermal Ventures II, L.P.

Class 1.4 All Other Secured Claims

Class 2

Class 2.1 Allowed Priority Tax Claim of the State of Ohio

Class 2.2 All Other Allowed Priority Unsecured Claims

Class 3

Class 3.1 General Unsecured Claims Up to $5,000.00

Class 3.2 General Unsecured Claims Equal to or Greater Than $5,000.01

Class 3.3 Penalty Claims

Class 4

Class 4 Equity Interests

b. Ballots and Certification

The Debtor timely filed a Certification of Acceptances and Rejections of the Proposed Second Amended Plan of Reorganization [docket # 509] (the "Certification"). The results of the voting (and a brief summary of the treatment of the various classes) are as follows:

Class Name	Class Description	% of Ballots Voting to Accept	% of Amount Voting to Accept	Result	Treatment
1.1	Summit County	100%	100%	Accept	Payment of 100% per payment plan

1.2	University of Akron	0%	0%	Objection Filed	Contract assumed and rights preserved
1.3	Thermal Ventures II, L.P.	100%	100%	Accept	Claim waived except $75,000
1.4	Other Secured Claims	N/A	N/A	N/A; No Creditors in this Class	N/A
2.1	State of Ohio Priority Claims	0%	0%	Agreed to Treatment	Payment of $1,500,000 (roughly 70% of claim)
2.2	Priority Claims (Other than the State of Ohio)	N/A	N/A	N/A; No Creditors in this Class	N/A
3.1	Unsecured Creditors at $5,000 or Below	98.39%	94.61%	Accept	10% dividend 90 days after Effective Date
3.2	Unsecured Creditors Over $5,000	92%	16.07%	Reject	Pro rata share of $2,040,000, plus potential enhancements
3.3	Penalty Claims	0%	0%	Deemed Rejected	No payment
4	Equity Interests	100%	100%	Accept	TVII and Opportunity Parkway retain their interests; other interests extinguished

The Debtor did not receive the minimum percentage of votes from its class 3.2 unsecured creditors required by §§ 1126 and 1129(a)(8). Thus, the Debtor invoked the so-called "cramdown" provisions set forth in § 1129(a).

6. Plan Objections and Responses

The City timely filed an objection to the Plan ("City's Objection"). [docket # 488]. Other timely objections were filed by Ohio Edison Company ("Ohio Edison") [docket #496], the United States, on behalf of the United States Environmental Protection Agency ("U.S. EPA")

(the "U.S. EPA Objection") [docket #497]; the University of Akron's (the "University") Limited Objection (the "University Objection") [docket # 505]; and Summa Health System ("Summa") (the "Summa Objection") [docket # 507].

On August 22, 2008, the UCC filed its responses to the U.S. EPA Objection and to the City's Objection. [docket ## 500 and 508, respectively] On August 24, 2008, Debtor filed a brief in support of confirmation of the Plan. [docket #510] The Debtor filed modifications to the Plan on September 9, 2008 and September 26, 2008 ("Plan Modifications"). [docket ## 523 and 528, respectively]

The U.S. EPA's Objection was resolved by the entry of an Agreed Order between the Debtor, the United States and the UCC (the "U.S. EPA Agreed Order"). [docket #536] The Summa Objection was resolved pursuant to the terms set forth in the Agreed Order (the "Summa Agreed Order"). [docket #537]. On November 3, 2008, the University Objection was resolved pursuant to the terms set out in an Agreed Order (the "University Agreed Order"). [docket #546]

7. Confirmation Hearing

The confirmation hearing was held on August 25, 26, September 5, 8, 9, 12, 15, 18 and October 3, 2008 (the "Confirmation Hearing"). During the Confirmation Hearing, the City filed an amended objection to confirmation [docket #488] and a supplement to its Motion to Modify the Partial Opinion [docket #525] asking the Court to consider the Notice of Violation and Finding of Violation issued on September 17, 2008 by the U.S. EPA to the City (the "September 17 Notice of Violation") as evidence in the Confirmation Hearing.

On December 12, 2008, the City filed a Request For Oral Rulings Rendered January 31, February 22 and July 25, 2008 To Be Set Out In Separate Documents Pursuant To Bankruptcy Rules 5003, 7052, 7054, 9021 and Civil Rules 52, 54, and 59 ("Request For Separate

Documents") [docket #558]. Debtor filed a Memorandum In Opposition to the Request For Separate Documents on December 19, 2008 [docket #559]. The Court discussed the City's Request [docket #558] in a telephonic status conference held January 16, 2009, noting that the Court would enter judgment with respect to those matters in the context of its ruling on the confirmation issues. All parties participating in that status conference agreed that approach was optimal because, should there be appeals of any of those issues, such matters could be raised in a single appeal.

II. DEBTOR'S ORGANIZATIONAL STRUCTURE, FACILITIES AND BUSINESS

Because the feasibility of the Plan depends, *inter alia*, on the Debtor's operation of the facilities that it leases from the City, the following is the Court's summary understanding of the history of the Debtor and its controlling entities, the history of the leased facilities, and a sketch of the Debtor's pre-filing interaction with the City in its capacity as the Debtor's landlord.

A. Debtor's Organizational Structure

Debtor was initially organized in 1995. At that time Debtor's general partner was Thermal Ventures, Inc. ("TVI"). For several years following the Debtor's initial formation, an entity named Thermal Ventures, Limited Partnership ("TVLP") owned an equity stake of over 90% in the form of a limited partner interest in Debtor. During the case, it was averred without contradiction that, as of 2000, Carl Avers controlled both TVI and TVLP. TVI remained the sole general partner (and TVLP owned over 90% of the limited partner interests) of Debtor until December 23, 2004.

TVI also had interests in entities and projects other than Debtor. In 2000, TVI was seeking funding for a number of its projects, one of which was Debtor, and other possible new ventures. In mid 2000, TVI, TVLP, and Yorktown Thermal G.P., Inc. ("Yorktown") (created by

Yorktown Energy Partners IV, L.P., a New York private equity firm) formed Thermal Ventures II, L.P. ("TVII"). To fund TVII, TVI contributed its interests in a number of ventures, and Yorktown contributed cash and certain funding commitments, which were subsequently funded. One of the interests provided to TVII by TVI and TVLP was an option for TVII to acquire TVI's general partner interest and TVLP's limited partner interests in Debtor. As noted above, TVI remained the sole general partner and TVLP remained the primary limited partner of the Debtor until December 23, 2004. TVII did not obtain any partner interests in Debtor until the end of 2004.

In 2003, TVII sought to exercise its option to acquire the interests of TVI and TVLP in the Debtor. Prior to doing so, representatives of TVII and Debtor met with the City and its agents and sought the City's consent and cooperation if new management became involved. Under the Lease, the City's consent to a change in general partner of Debtor was required. When TVII sought to exercise its option, it was generally aware that the Debtor's financial situation was not good. As of December 31, 2003, Debtor reportedly owed TVII over $7 million and owed the City, State of Ohio, and Ohio Edison approximately $5 million, $4 million (including interest and penalties) and $3 million (including interest), respectively, which amounts are still labeled as disputed by the Debtor, although the nature of any such disputes has never been articulated in this case. TVII reportedly shared its hope that, once it exercised its option, the Debtor would be able to propose some form of debt composition to its largest creditors.

In July 2004, the City sent a letter which stated, in part, as follows:

> With this letter we are granting our unconditional consent for Thermal Ventures, Inc. and Thermal Ventures, LP to proceed with the transfer of their general partner and limited partner interests respectively as defined in

the lease agreement and purchase and sale agreement between each party and the City of Akron.

Debtor's Assumption Exhibit 42.

Thereafter, TVII gave notice of its intent to exercise its option to acquire TVI's and TVLP's interests in Debtor. TVI and TVLP, after initially requesting the City's consent, opposed the exercise, which resulted in arbitration. In November 2004, the arbitrator ruled in favor of TVII and directed TVI and TVLP to turn over their interests in Debtor. During 2003 and 51 weeks of 2004, Debtor continued to be managed by TVI and continued to accumulate substantial operating losses. Following the arbitration award, Opportunity Parkway, LLC became the sole general partner and TVII became the 94% limited partner of Debtor effective late December 2004.

B. Debtor's Business

Jeffrey Bees serves as the president of Opportunity Parkway, LLC and Teri Kechler serves as its treasurer. Opportunity Parkway, LLC in turn provides the services of Bees and Kechler, as needed, to the Debtor. Richard Pucak has been the general manager of Debtor since 2000. Debtor employs approximately 43 full-time and 9 part-time employees. Debtor's work force has been stable with low turnover and has demonstrated responsibility and ingenuity.

The Debtor is a public utility that uses facilities leased to it by the City to generate and distribute steam primarily for heating to a variety of customers located in Akron, Ohio. The Debtor provides essential services to customers with critical needs, most significantly, three area hospitals. The physical plant that is central to the provision of steam and chilled water to the Debtor's customers has evolved over a period of almost eight decades. Within the past three years and in an environment in which energy costs have generally outpaced inflation, the Debtor

has succeeded in introducing a fuel source that allows it to operate on a very competitive basis. This is essential because two of its largest customers, the University of Akron ("University") and Akron City Hospital ("City Hospital") have the ability to satisfy their own steam needs. If they could do so at a cost that was predictably lower than what they are charged by the Debtor, that portion of Debtor's business would likely evaporate.

Using some of the same facilities, Akron Thermal Cooling, LLC ("ATC"), an entity that shares the same general partner as Debtor, produces and distributes chilled water which is used for air conditioning by various customers located in Akron. ATC did not file a petition for relief in bankruptcy. Both companies are regulated utilities in Ohio.[1] Debtor's leased system includes two adjacent steam generating plants (the Akron Plant and the BFG Plant), two chilled water plants, and approximately 18 miles of distribution piping that are substantially underground (generally the "Leased Facilities"). ATC uses two chilled water plants. Debtor provides ATC with steam.

Under the Plan, ATC is to contribute its income and earnings to the Reorganized Debtor but is to remain a separate entity to achieve appropriate tax savings. Although not so characterized by any party, the Court views this arrangement as a modified form of substantive consolidation. It is wholly appropriate in this case because of the centrality of the Leased Facilities to the ATC operations and because of past practices. Thus, as discussed below, no value can be attributed to income stream in assessing new value issues.

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[1] The primary reason for organizing two separate entities is that Debtor is subject to gross receipts taxes by the State of Ohio, whereas ATC is not. The two companies are operationally and financially interdependent. In 2007, total revenues for Debtor and ATC were $15.7 million (including $14.4 million and $1.3 million, respectively) and combined EBITDA (excluding certain nonrecurring and bankruptcy related items) was $1.3 million (including $1.1 million and $.02 million respectively). In its Disclosure Statement, Debtor projected combined total revenues and EBITDA (excluding certain nonrecurring and bankruptcy related items) for 2008 to be, respectively, $15.8 million and $1.9 million.

C. Leased Facilities

The following history of the Leased Facilities is summarized from the Disclosure Statement.

Ohio Edison installed the central steam distribution system in 1927, expanded it through the 1940's and operated it until 1978 at which time it was turned over to the City. The original Ohio Edison Beech Street steam generation facility was operated until 1979 at which time the City replaced it with the RES Facility (also known as the Akron Plant). By 1982, the City had added a high-pressure steam distribution and condensate return system to expand the area that could be served by the RES Plant and thus its potential customer base. The RES Facility, which has three boilers, was built as a steam generation plant burning refuse-derived fuel (solid waste). When serious problems developed with the use of refuse-derived fuel, the operators resorted to other fuel sources, including the more costly alternative of natural gas. When the Debtor became the operator, it converted the RES Facility so that it could be fueled primarily by wood chips and waste oil. In 2004 and 2005 Debtor developed the capability to use tire-derived fuel ("TDF"), i.e., utilizing used tires as part of its fuel mix at the Akron Plant.

Debtor also operates a coal and gas fired steam generation plant (known as the BFG Plant) consisting of two boilers and associated equipment was originally built by the B.F. Goodrich Tire Company in the 1950's and 1960's. The BFG Plant was connected to the Akron Plant in 1988 by the City to further expand the system.

The chilled water plants, now operated by ATC, were built in the mid-1980's and 1996, respectively.

The distribution and generating assets have been operated, in whole or in part, by Ohio Edison (through 1978), Teledyne National, Inc. (1979-1982), TriCil, Inc. (1982-1984), WTE

Corp. (1985-1994) and Debtor (1995-present), albeit with a 2004 change in management. In its Lease Assumption Motion, Debtor sought authority to assume the lease of the system which runs through August 15, 2017.

III. DISPUTED ISSUES

A. Compliance with the Requirements of Section 1129 of the Bankruptcy Code

The requirements for confirmation are set forth in § 1129. The plan proponent bears the burden of proving by a preponderance of the evidence that the plan complies with each of the requirements set forth in § 1129(a). If an impaired class votes not to accept the plan, the plan proponent must also prove that the plan meets the additional requirements of § 1129(b), including that the plan does not unfairly discriminate against dissenting classes and the treatment of the dissenting classes is fair and equitable. *In re Exide Technologies, et. al.*, 303 B.R. 48, 58 (Bankr. D. Del. 2003). Debtor, as proponent of the Plan, has met its burden of proving the elements of Section 1129(a) and (b) of the Bankruptcy Code, as further discussed herein below, by a preponderance of the evidence, which is the applicable evidentiary standard.

The Court will address its resolution of disputed factual issues and its conclusions of law[2] as they relate to the requirements of Section 1129(a) and (b). As a threshold matter, the Court notes that it will limit its analysis to the disputed controversies pertaining to feasibility (§§ 1129(a)(11)) and "cramdown" (§ 1129(b)). Matters pertaining to the remaining requirements of

[2] The parties in interest in this matter have submitted Proposed Findings of Fact and Conclusions ("PFFCL") of law [docket nos. 531, 532-33] which this Court has found helpful in analyzing and organizing the voluminous evidence adduced in this case. For the convenience of readers interested in those resources, throughout this Opinion, the Court makes reference to various PFFCLs of each party.

§ 1129 are not in dispute and were adequately addressed in the confirmation hearing. The Court finds that those requirements are satisfied and hence will not be discussed in this Opinion.

1. Debtor's Plan is Feasible Because Debtor Can Cure The Prepetition Defaults and Provide Adequate Assurance Of Future Performance and Prompt Cure Of Pre-Petition Defaults (Section 1129(a)(11))

The well-established standard by which feasibility is judged is that confirmation does not demand a guaranty of the plan's success, just a reasonable prospect. *See In re Mallard Pond Ltd.*, 217 B.R. 782, 785 (Bankr. M.D. Tenn. 1997). Section 1129(a)(11) directs that, in order to obtain confirmation, Debtor must show "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization . . . ." This section "requires courts to scrutinize carefully the plan to determine whether it offers a reasonable prospect of success and is workable." Collier on Bankruptcy ¶ 1129.03[10](c) at 1129-74 (15th ed. rev. 2007) (quoting *Travelers Ins. Co. v. Pikes Peak Water Co.* 779 F. 2d 1456, 1460 (10th Cir . 1985); *In re Rivers End Apartments, Ltd.*, 167 B.R. 470, 476 (Bankr. S.D. Ohio 1994). However, § 1129(a)(11) does not require a guarantee, it just requires that the plan has "a reasonable prospect of success and is workable." *In re Rivers End Apartments, Ltd.*, 167 B.R. at 476.

Debtor's satisfaction of feasibility under § 1129(a)(11) "does not require proof that meeting the economic projections is certain." *In re Ridgewood Apartments of DeKalb County, Ltd.*, 183 B.R. 784, 789 (Bankr. S.D. Ohio 1995) (citing *In re U.S. Truck Co.,* 47 B.R. 932, 944 (Bankr. E. D. Mich. 1985), *aff'd,* 800 F.2d 581 (6th Cir.1986)). The feasibility requirement exists "to prevent confirmation of visionary schemes." *Id.* (citing *In re Pizza of Hawaii, Inc.,* 761 F.2d 1374 (9th Cir.1985). It is the plan proponent's obligation to provide the court and parties in interest with sufficient information to make the determination of feasibility. There are a number of factors typically relevant to determining feasibility, including:

(a) the prospective earnings of the debtor's business;
(b) the soundness and adequacy of the capital structure and working capital for the debtor's post-confirmation business;
(c) the debtor's ability to meet its capital expenditure requirements;
(d) economic conditions;
(e) the ability of management and the likelihood that current management will continue; and
(f) any other material factors that would affect successful implementation of the plan.

See, e.g., In re Mallard Pond Ltd., 217 B.R. at 785.

At the same time, the mere potential for failure, prospects of financial uncertainty, or barriers to consummation of the plan are insufficient to disprove "feasibility." *See In re Union Fin. Servs. Group, Inc.*, 303 B.R. 390 (Bankr. E.D. Mo. 2003); *In re Cajun Elec. Power Co-op, Inc.*, 230 B.R. 715 (Bankr. M.D. La. 1999); *In re Sagewood Manor Assocs. Ltd. P'ship*, 223 B.R. 756 (Bankr. D. Nev. 1998; *In re Montgomery Court Apartments, Ltd.*, 141 B.R. 324, 330 (Bankr. S.D. Ohio, 1992)

Debtor argues that the evidence introduced at the Confirmation Hearing established that it will be able to timely perform all of the obligations described in the Plan and that the Plan is therefore feasible. The City contends that Debtor has failed to demonstrate that its Plan is feasible and that it can cure the defaults and give adequate assurance of future performance under the Lease. Specifically, the City's arguments focused on the following: (1) Cash Sources and Uses at the Effective Date; (2) Funding Cure of Defaults Under the Lease; (3) 2005 Amendatory Agreement; (4) Repair of Fire Damage to the Roof of the RES Facility; (5) Condensate Return Line from Summa to the University; (6) Secured Claim of the University; (7) Continued Undercapitalization of the Debtor; (8) Inaccuracy and Unreliability of Debtor's Financial Projections; (9) Environmental Matters (10) Maintenance Issues; and (11) Rejected City Contracts. *See* City's PFFCL ¶¶ 37-258; 295-96.

For the reasons set forth below, the Court concludes that the Debtor has established by a preponderance of the evidence that it will be able to timely perform all of the obligations described in the Plan and the Plan is therefore feasible.

a. Findings Regarding the Reorganized Debtor's Projected Future Performance

To demonstrate feasibility of the Plan, Debtor presented the testimony of its financial advisor, Jason Fensterstock, the principal of Sasco Hill Advisors. With the assistance of Mr. Fensterstock, Debtor prepared a 2008 monthly set of projections, as well as a five year set of projections, referred to as the "Base Case" projections, which included as Exhibit D to the First Amended Disclosure Statement. All of the projections assume the contribution of the net income of ATC. The projections are derived from an operating model which has been in place for several years. The Base Case projections contain a 2008 monthly income statement, balance sheet and statement of cash flows. The Base Case projections also contain a five year projected income statement, balance sheet, and statement of cash flow. The five year projections also include actual performance from the combined operations of Debtor and ATC in 2005, 2006 and 2007. Upside and downside cases were added as Exhibit G to the First Amended Disclosure Statement dated July 14, 2008. *See* Debtor's PFFCL ¶¶ 52-55

As part of the process, Mr. Fensterstock shared the model with David Wehrle, the UCC's financial advisor. Mr. Wehrle testified that he believed the Base Case projections were reasonable and achievable. Mr. Wehrle also testified that he believed the Reorganized Debtor would be adequately capitalized under the Plan. *See* Debtor's PFFCL ¶ 56. The Court notes that Mr. Wehrle's client had ample incentive to closely scrutinize the Debtor's prospects, as payments to holders of general unsecured claims will not commence until a year and a half following the Effective Date of the Plan.

Debtor's Exhibit 11 summarizes the comparison of projected EBITDA to actual EBITDA performance and shows that for the period January 1, 2008, through July 31, 2008, the actual performance has exceeded the Base Case projections by $271,000. *See* Debtor's PFFCL ¶ 58-66. Evidence was adduced during the Confirmation Hearing documenting Debtor's ability to operate its business and meet its Plan obligations since the Petition Date. *See* Debtor's PFFCL ¶ 60-61.

Based on the Debtor's actual performance and the testimony presented at the Confirmation Hearing the Court finds the Base Case Projections to be reasonable and credible evidence of the Debtor's likely performance. The Base Case projections reflect that Debtor will have sufficient cash flow to meet its operating expenses and future Plan obligations.

b. Findings Regarding Cash Resources and Capitalization.

As noted in the Partial Opinion, the Court has been clear that it will require that the Reorganized Debtor be adequately capitalized. At the time of the Confirmation Hearing, the parties assumed an Effective Date of September 30, 2008. Assuming that Effective Date, Debtor anticipated the following cash sources and uses which is set forth in Debtor's Exhibit 34 at 1 and 2:

Cash Sources and Uses at Plan Effective Date
Assuming September 30 Effective Date

SOURCES:		**USES:**		
Cash:		**Cash:**		
TVII Escrow	$2,000,000	Rent	$987,000	
Cash Deposit (1)	45,000	Franchise Fees	93,000	
Collection Actions (2)	0	Prepaid Steam I	383,000	
City Sewer Overpay	0	Prepaid Steam II	210,000	
Cash	355,000	Pre-Petition Interest	546,000	
Additional Equity (3)	1,000,000	Real Estate Taxes	110,000	
Line of Credit	250,000	PostPet Interest	165,000	
		State Payment	150,000	
		Admin Costs (4)	600,000	
		Convenience Class	20,000	**Excess**

				Cash
Total:	**$3,650,000**	**Total:**	**$3,264,000**	**$386,000**

(1) With Schottenstein, Zox & Dunn Co., L.P.A. ("SZD").
(2) For purposes of this analysis only, assumes no cash received from the collection actions by Effective Date.
(3) Formerly a line of credit.
(4) Assumes payment of all remaining bankruptcy professional costs in September including those paid during month and at closing and includes all prior holdbacks and August and September time, i.e. includes invoices received for full month of September. Excludes $150,000 owed to Sasco Hill Advisors and SZD which are to be paid no later than December, 2008.

See also Debtor's PFFCL ¶ 70.

The City contends that the following items must also be paid at the Effective Date, each of which the debtor disputes:

A.	Additional Cure Amount Pre-Petition Interest on 2005 Amendatory Agreement	$26,922.27
B.	Additional Post-Petition Interest to City of Akron (incl. 2005 Amendatory Agreement)	$20,577.78
C.	Increase in Utility Deposit to First Energy	$50,000
D.	University of Akron Secured Claim	$267,244
E.	Balance of Cure Amount to University of Akron	$475,414
F.	Unrepaired Fire Damage to RES Roof	$380,000

See Debtor's PFFCL ¶ 74.

The Court is more persuaded by the Debtor's calculations of cash sources and uses. With respect to cash uses, the rent, franchise fees, prepaid steam (I and II), pre-petition interest and real estate taxes are all addressed at pages 34 and 35 of the Partial Opinion.[3]

[3] The Debtor also includes cash expense of $600,000 for administrative costs. This includes all prior holdbacks for professional fees, including over $250,000 under the First, Second, and Third Fee Applications. The Court has not yet approved payment on those holdbacks, so those payments will not be due until sometime after the assumed Effective Date of September 30, 2008, thus providing additional cash cushion at the Effective Date

With respect to items A through C above, the City's claims are flawed for the reasons set forth in Debtor's PFFCL ¶ 76-78. The next two items (Items D and E) claimed by the City are amounts allegedly due the University of Akron as part of the Debtor's assumption of the May 3, 2006 Service Agreement with the University. As more fully described in the University Agreed Order [docket no. 546], there is no amount due the University at the Effective Date. Finally, the City claims that $380,000 is due at the Effective Date in connection with certain roof repairs (Item F). Matters concerning the roof repairs are discussed at Section 5 (a) below. For the reasons noted in that section, the Court finds that the City did not bear its evidentiary burden with respect to this very belatedly identified assertion.

Based on the foregoing, the Court is persuaded by the Debtor's evidence that the amount needed to cure all pre-petition defaults under the Lease, Franchise Ordinance and License Agreements as of the Effective Date is in the range of $2.5 million, plus interest accruing at slightly more than $10,000 per month since the end of the Confirmation Hearing. *See* Debtor's PFFCL ¶ 81.[4] Accordingly, the Court finds that there will be sufficient cash at the Effective Date to satisfy the obligations due on the Effective Date and the costs and expenses of this Chapter 11 case. The Court further finds that with an equity infusion of $3 million, the $250,000 line of credit, and the projections for future performance set forth in the Base Case, Debtor is and should remain adequately capitalized to meet its obligations under the Plan, including payments to creditors under the Plan, and to operate its business through 2017.

c. Findings Regarding Cure and Adequate Assurance of Future Performance

[4] This figure is derived from the chart in Debtor's PFFCL ¶73 ($2,487,054) less the $47,500 in interest on the 2005 Amendatory Agreement. Debtor admits that if the Effective Date is after September 30, 2008, interest on the principal amounts (but not the pre-petition interest) would be approximately $10,000 per month.

Section 365(a) of the Bankruptcy Code provides that the Debtor can, subject to the Court's approval, assume an unexpired lease. 11 U.S.C. § 365(a). Section 365(b)(1) also provides that if there has been a default under the unexpired Lease, then the Debtor must cure or provide adequate assurance of a prompt cure of the items described in subsections (A), (B) and (C). In considering the application of Section 365(b), some courts have viewed it through a lens that might distort in favor of debtors: "the purpose behind chapter 11 is 'to permit successful rehabilitation of debtors' and 'to prevent a debtor from going into liquidation'," (Bankr. W.D. Tenn, 1992); *In re R/P Int'l Techs., Inc.*, 57 B.R. 869, 873 (Bankr. S.D. Ohio 1985) (citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513). This Court's lens differs from the foregoing. Unexpired leases and executory contracts are potential assets that debtors sometimes can use for the benefit of the bankruptcy estate. Broadly speaking, this Court views § 365(a) as a tool that Congress has made available to debtors and trustees to promote a spirit of equality of return to all creditors, rather than allowing *ipso facto* clauses to operate simply for the benefit of a non-debtor party to the contract, without the possibility of realizing the value of contractual arrangements to the detriment of the remaining creditor body.

i. Burden of Proof on Defaults under the Lease

In determining whether a default exists under a lease or contract, bankruptcy courts "must look to state law." *In re Rachel Indus., Inc.*, 109 B.R. 797, 803-04 (Bankr. W.D. Tenn. 1990) (citing *In re Terrell*, 892 F.2d 469 (6th Cir. 1989). In Ohio, "leases are contracts and are subject to the traditional rules of contract interpretation." *Mark-It Place Foods, Inc. v. New Plan Excel Realty Trust*, 156 Ohio App.3d 65, 83, 2004-Ohio-411 at ¶ 29.

While the Debtor, as the party moving to assume the Lease, has the ultimate burden of proof, the City "has the initial burden of showing defaults and that those defaults have been properly noticed" to the Debtor. *In re Rachel Indus., Inc.*, 109 B.R. at 802. However, if the

City, as lessor, fails to prove a default then the Debtor is, obviously, not required to prove the elements of Section 365(b)(1). *Id.* The City has the burden of proving the amount of Debtor's default under the Lease in order to establish Debtor's cure obligation. *Id.* If the City has established the defaults by proof, "then the burden shifts back to the debtor to provide satisfactory proof that the defaults . . . will be promptly cured and that there would be adequate assurance of future performance." *Id.* (citing *In re OK Kwi Lynn Candles, Inc.*, 75 B.R. 97, 101 (Bankr. N.D. Ohio 1987)).

In this case, the Court has found above that the total monetary payment needed to cure all pre-petition defaults is approximately $2.5 million as of the Effective Date. Thus, Debtor bears the burden of providing proof of its ability to provide prompt cure of this amount and adequate assurance of future performance.

ii. Standard on Cure and Adequate Assurance of Future Performance.

Regarding the cure of defaults or adequate assurance of a prompt cure of defaults, the Bankruptcy Code does not delineate exactly what is required so reference to case law is necessary. "What is adequate assurance, both for purposes of a prompt cure and for future performance, will depend . . . on individual circumstances." *Motor Truck and Trailer Co. v. Berkshire Chem. Haulers, Inc. (In re Berkshire Chem. Haulers, Inc.)*, 20 B.R. 454, 459 (Bankr. D. Mass. 1982) (cited in *In re DWE Screw Prods., Inc.*, 157 B.R. 326, 331 (Bankr. N.D. Ohio 1993)).

As noted in a Collier treatise on real estate transactions, "[t]he language of section 365(b)(1)(A) of the Code, providing for cure or adequate assurance of prompt cure of outstanding lease defaults as a condition to assumption, clearly contemplates that something less than immediate payment or performance of defaulted obligations will be sufficient." 1-3 Collier Real Estate Trans. & Bankruptcy Code ¶ 3.01[5][a]; *see also*, *In re Ok Kwi Lynn Candles, Inc.*,

75 B.R. 97, 101 (Bankr. N.D. Ohio 1987) (citing 2 Collier on Bankruptcy ¶ 365.04, at 365-68 (15th ed. 1987)). That may be so, but in this case, the Debtor is to pay all amounts identified for cure of existing defaults promptly and not later than after the judgment entered in accordance with this confirmation decision becomes final and non appealable.

Adequate assurance of future performance is often equated with the financial stability of the debtor, as reorganized in bankruptcy. *See In re Rachel Indus. Inc.,* 109 B.R. at 803 (quoting *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F. 2d 1303, 1310 (5th Cir. 1985)) With respect to future performance under an unexpired lease, the term "adequate assurance" is also not defined within the Bankruptcy Code and reference to case law is necessary. *See In re Rachel Indus., Inc.*, 109 B.R. at 803 (citations omitted). The purpose of the "adequate assurance" of future performance analysis is to determine whether the obligations under a lease, as bargained for prior to bankruptcy, will be met; it is not to improve the position of the landlord. *See In re Embers 86th Street, Inc.*, 184 B.R. 892 (Bankr. S.D.N.Y. 1995); *In re Grayhall Resources, Inc.*, 63 B.R. 382 (Bankr. D. Colo. 1986) (cited in 9C Am. Jur. 2d Bankruptcy § 2364).

Accordingly, in the context of lease assumption, the City may not demand assurance of payment of any obligations beyond those required by the Lease. *See Richmond Leasing Co. v. Capital Bank*, N.A., 762 F.2d 1303 (5th Cir. 1985). Debtor can meet its burden to show adequate assurance of future performance under the Lease by showing that its "performance is likely, i.e., more probable than not." *In re Texas Health Enters., Inc.*, 246 B.R. 832 (Bankr. E.D. Tex. 2000) (cited in 2C Bankr. Service. L. Ed. § 21:478). In the broader context of feasibility, this Debtor has adduced evidence that it will be able to remain current on the obligations that it will incur in the course of its operations. It has done so during the pendency of this chapter 11

case, and that track record is further evidence to this Court that the Debtor has met the adequate assurance requirements of § 365(b).

The Court finds that Debtor has established adequate assurance of future performance and that the pre-petition defaults will be promptly cured.

d. Findings Regarding General Maintenance and the Condensate Return Line

i. Ohio Law on Maintenance Obligations under a Commercial Lease and Interpretation of Section 9 of the Lease

Section 9 of the Lease, entitled "Maintenance of the Leased Property," provides that the Debtor is responsible for and shall pay the cost of all maintenance of the System and the Leased Property. (*See* Debtor's Assumption Ex. 1, Section 9, p. 8-9). Section 9 of the Lease does not impose an obligation upon the Debtor to reconstruct, improve or replace the Leased Property. Section 9 requires the Debtor to maintain the System and the Leased Property. (*See* Debtor's Assumption Ex. 1, Section 9, p. 8-9).

Ohio law on the subject of lease covenants regarding maintenance by a tenant provides that a promise by the tenant to keep the leased property in repair, unless the language of the promise clearly provides otherwise, does not obligate the tenant to make repairs other than those that are the result of ordinary wear and tear on the leased premises. *See Mach v. Accettola*, 112 Ohio App.3d 282, 285; 678 N.E.2d 617 (11th Dist. 1996) (quoting *Restatement of the Law 2d, Property* (1977) 497, Section 13.1, comment c. The court in *Accettola* analyzed a similar maintenance provision in a commercial lease and held that lease language requiring "repairs" or "maintenance" does not "mean replacement of the roof which was completely worn out." *See Id.* at 285-86, 88.

Just a few weeks prior to the Confirmation Hearing and well after the Assumption Hearings, the City raised for the first time the issue of whether the Debtor had adequately

repaired fire damage to a portion of the roof that had occurred in calendar year 2000. Although the Court is seriously tempted to analyze this issue under the rubric of waiver, in light of the pattern of forbearance toward the Debtor that the City exhibited in the first six years of this decade, such an analytical frame would not be the most just approach.

The language of Section 9 of the Lease requires the Debtor only to "be responsible for, and . . . pay the cost of, all maintenance of the System and the Leased Property." (*See* Lease at 8 (§ 9)). The Debtor is not required to reconstruct or improve the System and the Leased Property. Thus, Section 9 of the Lease obligates the Debtor to pay for maintenance and repairs that are required to preserve the original condition of the property as it was when the Lease began in August 1997, subject to normal wear and tear. While no evidence was presented that the roof repairs undertaken in 2001 were not sufficient to allow ordinary operation of the Leased Facilities, the Debtor does plan to do more work on the roof. Its ongoing maintenance plan going into 2009 provides for at least $75,000 to be used for further work on the roof.

ii. The City Has Not Established a Lease Violation Concerning General Maintenance

The City argues that Debtor has not maintained the RES Plan, BFG Annex Steam Plant, and the Leased Property, and that these facilities are in need of major equipment and infrastructure maintenance constituting a default under Section 9 of the Lease. *See* City's PFFCL ¶¶ 252-54; *See* Debtor's PFFCL ¶ 81. The evidence presented by the City on these issues and other maintenance issues did not support these broad assertions. Rather, the Debtor adduced substantial evidence, including on cross-examination of maintenance experts called by the City, that Debtor has properly maintained the System and the Leased Property and that there is no lease violation concerning general maintenance. *See* Debtor's PFFCL ¶¶ 89-111.

iii. The City Has Not Established a Lease Violation Concerning the Condensate Return Line

The City argued that the Debtor should be require to pay $1 million to the City to repair the condensate return line which runs from City Hospital to the University. *See* City's PFFCL ¶ 118; Debtor's PFFCL ¶¶ 85, 129. Based upon the testimony of Richard Pucak and the City's experts, this Court concludes that, throughout the Assumption Hearings and perhaps well into the Confirmation Hearing, the City had not reviewed sufficiently its own records with respect to the state of that system prior to entering into the Lease. It is now clear that, based upon evidence of the condition of the condensate return line in 1992, the Debtor has met and exceeded its obligations to maintain the condensate return line consistent with its obligations under the Lease.

This Court previously concluded in the Partial Opinion that the Debtor's obligation was to return the Leased Property (including the condensate return line) to the City in the condition that it was in at the inception of the Lease. Specifically, this Court directed that if the System included a functioning City Hospital condensate return line at the time the Lease was executed, the Debtor's Plan would have to provide a means for putting that return line back into service within a prompt period of time.

At that point, the record was unclear whether the City Hospital condensate return line was operating in August of 1997 when the Lease was signed. This Court concluded provisionally that the City therefore had not met its burden of proving that the decision in 2007 to modify the System by shutting down that return line constitutes a breach of the Debtor's maintenance obligations. However, the City's evidence that came into the record during the Confirmation Hearing has put the condition of the condensate return line in an entirely different light. Based upon the new evidence that came into the record during the Confirmation Hearing, which will be detailed below, the Debtor's obligation to the City, as landlord, was significantly

less with respect to the condensate return line because of the existing deterioration of the line at the time Debtor took possession of the System in 1997

At the Confirmation Hearing, the City's expert witnesses, Mr. Bacha and Mr. Young, testified that the cathodic protection system which was installed during the construction of the steam system in 1978 was not operating in June 1992. This was established by the Ricwil Report, City Exhibit I. Mr. Young testified that without cathodic protection, the steam distribution system would begin to corrode. Mr. Young further testified that based upon the Ricwil Report, the useful life of the cathodic protection system installed with this condensate return line was less than the normal useful life of 15 years. *See* Debtor's PFFCL ¶¶ 148-161; City's PFFCL ¶¶ 104-127. The City offered no evidence that it made any effort to repair or replace the cathodic protection system between 1992 and 1997. Thus, this Court can only conclude that the condensate return line was corroded well prior to August 15, 1997.

Further, based upon the testimony presented at the Confirmation Hearing, the Court concludes that the Debtor was working to assure that the condensate return line would be operational at the expiration of the term of the Lease. Richard Pucak testified that the Debtor was "sleeving" a 3 inch pipe into the 5 inch condensate return line, and that upon completion of the sleeving, the condensate return line would be operational. Mr. Pucak also testified that the "sleeving" of the 3 inch line will not affect the integrity of the steam distribution system, and that a 3 inch pipe is sufficient to handle the volume of condensate usually returned by City Hospital, with excess capacity. Mr. Pucak testified that sleeving the 3 inch pipe into the current 5 inch condensate return line will allow the life of the system to be extended by at least ten years, and that even if it fails, the remedy will allow the operator a time and cost efficient remedy to maintain the condensate return line. Finally, Mr. Pucak testified that the Debtor has allocated

sufficient funds to properly repair the condensate return line and to maintain that line through the term of the Lease. *See* Debtor's PFFCL ¶¶ 132-148.

Based on all of the above, the Court finds that the cathodic protection of the condensate return line was failing long before August 15, 1997. Thus, Debtor's obligation is simply to maintain the functionality of the line used to return hot water to the steam plant, not to replace the line. The Court further finds that the continued sleeving of the condensate return line is appropriate maintenance of the line. The Debtor completed the repairs that it was obligated to make. Accordingly, the Court concludes that there is no violation or breach of the Lease related to the condensate return line.

e. Findings Regarding Repair of Fire Damage to Roof at RES Plan

i. The City Has Not Established a Lease Violation Concerning the Roof at the RES Plant

In its Motion to Modify Partial Opinion, the City asserts that $380,000 should be added to the Lease Cure because the Debtor failed to adequately repair the roof at the RES Plant as a result of the 2000 Fire. The City argues that the Debtor failed to make repairs to the roof at the RES Plant consistent with its obligations under the Lease, and, accordingly, the Debtor should be required to pay the City the $380,000 it asserts is required to repair the roof. *See also* City's PFFCL ¶¶ 44-103

As a threshold matter, this Court again notes its frustration with the City's delay in raising this issue. The City claims that it was not aware of the fire damage until the Assumption Hearing in March 2008 when it viewed photographs of what it thought was damage due to a lack of maintenance. This argument is disingenuous.

The fire occurred in 2000. The City admits that it had actual notice of the fire. Under the Lease, the City has the right as the lessor to inspect the property, yet it claims not to have

exercised that right until August, 2008 when Mr. Karlis inspected the roof. Accordingly, with respect to repair of matters dating back to damage incurred in the year 2000, the fact that the issue was not raised in the context of the Assumption Hearing presents a serious timeliness issue to this Court. However, the Debtor has not argued that the City is barred from addressing the fire damage issue in the context of the confirmation proceedings. Thus, the Court will proceed with its analysis of the evidence with respect to the fire damage.

Section 11 of the Lease governs the Debtor's obligation to repair the roof at the RES Plant as a result of the 2000 Fire. Section 11 of the Lease, entitled "Damage and Destruction, provides in its entirety:

> In the event of any damage to or destruction of the Leased Property or any portion thereof during the Term by fire, explosion or other casualty ("Damage or Destruction"), Tenant shall remain in possession of the Leased Property and shall repair or restore the affected portions of the Leased Property. Notwithstanding the foregoing, Tenant shall only be required in the event of Damage or Destruction to provide a ***functional replacement*** for the RES and/or the Annex for purposes of continuing electric, steam, hot water and chilled water services consistent with those currently provided by the System. (Emphasis added)

Section 11 of the Lease does not impose an obligation upon the Debtor to replace as new any part of the Leased Property which has been damaged as a result of a fire. Section 11 merely requires the Debtor to provide a functional replacement of any Leased Property damaged by a fire for purposes of continuing its services. (*See* Debtor's Assumption Ex. 1, Section 11, p. 10). Accordingly, under the Lease, the Debtor was only required to provide a roof which would allow the Debtor to continue to provide steam and hot water services and chilled water services to its customers.

Based upon the testimony at the Confirmation Hearing, the Debtor met its obligations under Section 11 of the Lease. At the hearing, Mr. Pucak testified that after the 2000 Fire, the

Debtor retained the services of Tri-State Restoration to perform repairs to the roof at the RES Plant. Tri-State performed repairs and was paid for the work it performed, which was approximately one-half of the estimated repairs. Mr. Pucak testified that after the repairs were made, the condition of the roof at the RES Plant did not prohibit the Debtor from producing steam and hot water and distributing that steam and hot water to its customers. Mr. Pucak testified that since 2001, the condition of the roof at the RES plant has not prevented the Debtor from functioning in its business. *See* Debtor's PFFCL ¶¶114-18, 124-27

As stated by this Court during the confirmation proceedings, the record is fuzzy as to the application of the $700,000 plus in insurance proceeds that was to be used for plant and property restoration as a result of the 2000 Fire. The Debtor has not been able to provide a clear-cut accounting of those proceeds.[5] That aside, this Court's overall impression of the testimony and evidence with respect to the repair work that the Debtor arranged to have completed is that it resulted in certain improvements to the premises, provided updated replacement parts, and in general, made the plant a better functioning plant for purposes of the evolving way in which steam was being produced.[6] Although not in pristine condition, the roof has stayed on and the RES Plant has continued to operate. Accordingly, the Debtor met its obligation to provide a "functional replacement" of the roof at the RES Plant as set forth in Section 11 of the Lease.

In addition, the City has offered no evidence that it is entitled to the immediate payment of $380,000 as damages based upon the Debtor's failure to repair the roof. First, as previously

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5 The change in the general partner of the Debtor that occurred at the end of 2004 was not amicable. Records from the Debtor's operations were not easily accessed. The City in its role of lessor had the right to such an accounting, though its failure to exercise that right within a reasonable time after the fire causes this Court to view the accounting issue as not timely raised. In reaching this conclusion, the Court notes that it was left with the general impression that insurance proceeds were applied to the functional repair of the Leased Facilities in the year following the 2000 fire.

6 For instance, the conveyor belts that were installed were narrower than the belts that had been there before because the type of fuel being used had changed.

noted, Debtor did repair the roof consistent with its obligations under the Lease. Second, Mr. Karlis, the president and owner of Tri-State admitted that as of September 21, 2001, only $145,268 of his estimated cost required to repair the fire damage to the roof at the RES Plant remained to be performed.[7] *See* Debtor's PFFCL ¶ 119. Third, the testimony of Mr. Conley, the City's own retained maintenance expert, does not support the City's contention that the cost to repair the roof is $380,000. In the Conley Expert Report, Mr. Conley opined that merely $75,000 was required to effectuate roof repairs at the RES Plant. This figure is consistent with the testimony of Richard Pucak, the Debtor's General Manager, who testified that he has received quotes for the repairs of the roof in the range of $75,000 to $125,000. *See* Debtor's PFFCL ¶ 124.

Based on the foregoing, the Court concludes that there is no evidence that the repairs to the roof at the RES Plant will cost $380,000. The Court is persuaded by the testimony of the Mr. Pucak that it has allocated money in its maintenance budget to make repairs to the roof at the RES Plant, and that the amount set forth in the budget is adequate to cover the ongoing costs of repair. Accordingly, the City has not established a default of the Lease as a result of the condition of the roof or the October 2000 fire at the RES Plant and is not entitled to the purported additional cure amount of $380,000. The City is merely entitled to have the roof repaired in accordance with the estimates received by the Debtor in the approximate amount of $75,000, a figure consistent with the expert report offered by the City (*See* Conley Expert Report).

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[7] Mr. Karlis' most recent quote for the roof repairs at the RES Plant was for $800,000. The Court does not view that quote to be credible. Aside from the wide variation between his 2001 estimate for the remaining repairs, Mr. Karlis stated that he is not an expert and that his quote is subject to so many contingencies that he considers it to be merely a guess. *See* Debtor's PFFCL ¶¶ 121-22. The Court appreciated Mr. Karlis' salesman's candor and believes that his testimony was more in the nature of an opening offer in a sales negotiation.

f. Findings Regarding Environmental Matters

i. The City Has Not Established A Default Related to U.S. EPA Matters.

The EPA Agreed Order fully resolves the U.S. EPA's proof of claim and the Debtor's potential liability for the payment of civil penalties. Therefore the City's Objection to Confirmation on this basis is not well taken and overruled.

With respect to any control measures, Debtor's Base Case projections include funds to litigate with the U.S. EPA if it is unable to reach a resolution with the U.S. EPA. If a settlement can be reached, the Base Case projections address the costs of installing air pollution control equipment to address the alleged violations of the Clean Air Act as set forth in the NOVs.

(a) Debtor has not failed to comply with Applicable Legal Requirements.[8]

The Debtor's potential obligation to indemnify the City of Akron, as set forth in Section 38 of the Lease, is contingent upon (a) Debtor's failure to comply with the "terms, covenants, provisions, or conditions of the Lease" or (b) the existence of damages resulting from an "Environmental Condition," as that term is defined in Section 37.2 of the Lease. Neither of these contingencies has occurred. As a result, as more fully explained below, there is no present indemnification obligation that must be addressed under the Plan.

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[8] A chapter 11 plan that proposes an actual reorganization routinely requires the bankruptcy court to deal with various moving targets, some of which can be addressed with finality and others of which are addressed in a necessarily speculative manner because those issues pertain to the feasibility analysis that the bankruptcy court is required to address. Other than on a consensual basis, this Court does not have present jurisdiction to resolve actual or potential controversies between Debtor and U.S.EPA over whether Debtor's post-filing and post-confirmation operations do or do not violate various federal environmental statutes. In the Partial Opinion, this Court examined the process by which U.S.EPA initiates its process; an NOV is simply the start of that process. The Debtor and U.S.EPA have in fact resolved on a consensual basis significant issues since the close of the Lease Assumption Hearing. Unfortunately the bankruptcy process can sometimes result in parties with contigent co-liability presenting evidence of worse case scenarios; the City's evidence on environmental issues illustrates this observation. The NOV that was served upon the City is not to be taken lightly, but the progress that the Debtor has made in working through environmental issues with the U.S.EPA and the incisive analysis of the Debtor's environmental counsel combine to persuade this Court that these matters will be resolved. One can hope that once the City no longer needs to present "worst case" scenario evidence and argument in this chapter 11 case, it will cease to work at cross purposes with the Reorganized Debtor in resolving their respective NOVs.

The City of Akron has previously argued that the Debtor is in default of Section 4.2 of the Lease by virtue of the Boiler 32 NOV. Section 4.2 of the Lease provides that:

> "Tenant . . . shall comply with all laws, rules, regulations, orders, and other requirements applicable to the Leased Property imposed by any Governmental Authority having jurisdiction with respect thereto, including, without limitation, those pertaining to the condition of the environment (collectively, "Applicable Legal Requirements")."

However, as this Court held at page 42 of the Partial Opinion:

> "Unless and until U.S. EPA institutes an enforcement action and Akron Thermal is the subject of a final decision finding a violation of the Clean Air Act, there is no default."

Because the Debtor is not in default of its obligation to comply with the Clean Air Act, it is not obligated to indemnify the City for costs of defense or other claims that might arise at some point in the future with regard to the alleged violations of the Clean Air Act contained in the Boiler 32 NOV.

On September 17, 2008, U.S. EPA issued a Notice of Violation to the City of Akron that, essentially, restates the alleged violations of the Clean Air Act that were set forth in the Notices of Violation issued to the Debtor for Boiler 32 and Boilers 1 and 2 (the "City NOV") (*See* City Exhibit Z). The City has asserted that the City NOV is an additional default under the Operating Lease.

However, as this Court previously held at page 41 of the Partial Opinion, an "NOV does not have the force of a law, rule, regulation, order, or other requirement." Accordingly, unless and until there is an enforcement action against the City ***and*** the City is the subject of a final decision finding a violation of the Clean Air Act, there is no default under the Lease and Debtor is not obligated to indemnify and defend the City, either for its costs incurred as a result of the NOV or any subsequent enforcement action. Moreover, because the Debtor's obligation to

indemnify the City is contingent upon a future finding of default under the Lease, it can not be considered to be a "pay-as-you-go" indemnification obligation. Unless and until there is a final determination by a court that the Debtor has operated Boiler 32 in violation of the Clean Air Act, there is no obligation for the Debtor to pay the City its potential defense costs or any other loss it might possibly incur as a result of that determination.

(b) The NOVs are not an "Environmental Condition".

When the Debtor and the City entered into the Lease, they were aware of certain pre-existing releases of contaminants on the Leased Property and other substances in the area outside of the Annex where Boiler 32 is located. Such releases can result in lawsuits by U.S. EPA and the imposition of cleanup obligations on present owners or operators, even though releases may not have violated any law existing at the time of the release. Prior to November 4, 1995, both Debtor and the City had access to the Leased Property. (*See* Debtor's Assumption Exhibit 3, p. 2) After November 4, 1995, Debtor had the exclusive right to occupy the Leased Property.

In its Motion to Modify, the City asserts that the NOVs issued to it and the Debtor are an Environmental Condition pursuant to Section 37.2 of the Lease. *See also* City's PFFCL ¶¶ 242-46. Section 37.2 of the Lease defined each of the pre-existing and potential future releases of hazardous substances as an "Environmental Condition" and allocated responsibility to the City for (certain) hazardous substance releases on the Leased Property that existed *prior* to November 4, 1995, and to the Debtor for (certain) releases of hazardous substances that occurred on the Leased Property *after* November 4, 1995.

Similarly, Section 38 of the Lease allocates the indemnification obligations of the City and the Debtor for Environmental Conditions, *e.g.*, releases of hazardous substances such as trichloroethane, based on whether they occurred before or after November 4, 1995.

The City's assertion that the NOVs issued to it and the Debtor constitute an Environmental Condition requires this Court to examine the origin of the phrase used in Section 37.2 of the Lease. The words "presence, use, generation, storage, transportation, treatment, recycling, reuse, reclamation, disposition, handling or release of any Contaminant" in the definition of "Environmental Condition" in Section 37.2 of the Lease tracks such language in the federal Resource Conservation and Recovery Act ("RCRA") and the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), which statutes address, *inter alia*, liability for the presence, generation, handling, storage, disposal and release of hazardous substances, not the requirements of the Clean Air Act, which uses the term "emission" of air pollutants.[9] Because the NOVs are not an Environmental Condition, they do not trigger the Debtor's obligation to indemnify the City under Section 38(b) of the Lease.[10]

(c) Debtor Is Not Obligated To Indemnify the City Under the Franchise Ordinance.

The City also claims that as a result of the NOVs issued to it and the Debtor, it is entitled to indemnification under Section 8 of the Franchise Ordinance, which provides that:

> Akron Thermal shall, at its sole cost and expense, fully indemnify, defend and hold harmless the City, its officers, boards, commissions, agents and employees from and against any and all losses, damages, expenses, claims, demands, causes of actions [sic] suits, proceedings, liabilities and judgments of every kind and nature whatsoever arising out of Akron Thermal's construction, maintenance or operation of the System or from its exercise of the rights and privileges herein granted, including, without any limitation, any injury or death to any person or damage to any property, real or personal.

[9] See *e.g.* the federal New Source Performance Standards at 42 U.S.C. §7411.

[10] Since the Boiler 32 NOV is not an Environmental Condition, it also follows that it is not an "Assumed Liability" under Section 3.2(c) of the Lease.

The Franchise Ordinance was enacted by Akron City Council on September 30, 1996 and contemplated that the City and Debtor would subsequently negotiate the current Lease, which was entered into by the parties on August 15, 1997. The Franchise Agreement was incorporated by reference into the Lease as Exhibit A.

The Lease provides at Section 22 that:

> This Lease, together with the Schedules hereto, the Purchase Agreement and other related agreements referred to herein or therein, is the entire contract between the parties relating to the subject matter hereof, and supersedes all prior and contemporaneous negotiations, understandings, and agreements, written or oral, between the parties and, specifically, the interim Agreement is hereby terminated and superseded by this Lease and Purchase Agreement.

The indemnification provision contained in Section 8 of Franchise Ordinance contains general language that is broader than the specific indemnification provisions in Section 38 of the Lease. It is well established under the generally applicable rules governing contract interpretation that specific provisions take precedence over more general provisions. *Smith Barney Inc. v. Sarver*, 108 F.3d 92, 97 (6th Cir. 1997). Accordingly, under the generally applicable rules governing contract interpretation, the more specific indemnification provisions in Section 38 of the Lease take precedence over the broad general language contained in the preceding Franchise Ordinance, and, as discussed above, there has been no event of default to trigger any obligation to indemnify the City.

Even if the indemnification provision contained in Section 8 of the Franchise Ordinance were determined create a binding obligation on Debtor, the issuance of NOVs to the City and Debtor does not require the Debtor to indemnify the City. As this Court noted at page 41 of the Partial Opinion:

> No legal consequences flow from the issuance of [an] NOV because it merely notifies [a company] of their [sic, its] existing obligations under the CAA [Clean Air Act]. It does not impose any new obligations or penalties on [a company], and does not even direct or request that [the company] correct the alleged violations. In order to compel action or impose penalties, EPA would have to pursue further enforcement action, at which time [the company] would have an opportunity to raise [its] defenses.... Absent such action, the findings and conclusions in the NOV have no direct and immediate . . . effect on the day-to-day business of [the company]." *Royster-Clark Agribusiness v. Johnson, Administrator, U.S. EPA*, 391 F. Supp. 2d 21, 2005 U.S. Dist. LEXIS 18918 (D.C. August 29, 2005), at fn 16 (Internal quotes and citations omitted.)

Accordingly, because the NOVs merely give notice of the EPA has defined an issue to be resolved but impose no present liability, they do create a present indemnification obligation from the Debtor to the City under Section 8 of the Franchise Ordinance. The Debtor continues to engage in discussions with the EPA to resolve the characterization of Boiler 32 either through an agreed course of action or, if necessary, through a not-yet-commenced litigation process.

(iv) Debtor's Argument that its Indemnification Obligation to the City is Limited by Section 13.3 of the Lease

Debtor argues that even if at some future time a court might determine that the Debtor has an obligation to indemnify the City for its costs of defense and other claims arising from the potential future enforcement litigation associated with the alleged Clean Air Act violations set forth in the NOVs, this indemnification obligation is limited by the language of Section 13.3 of the Lease. Section 13.3 of the Lease provides that where, as here, the Tenant remains in possession of the Leased Property:

> ". . . Landlord and Tenant hereby acknowledge and agree that in any legal proceeding based upon Tenant's default, except as to any proceeding involving or pertaining to Tenant's obligations with

> respect to Environmental Conditions, Landlord's total recovery against Tenant shall not exceed the Liquidated Damages.[11]

This Court recognizes that, in what the Court views to be the unlikely event that the City's worst case scenarios prove true, Debtor is reserving the right to make this argument. This Court refrains from addressing the matter because, at this stage, it would appear to be nothing more than an advisory opinion.

g. Assumption of the Franchise Ordinance

The limitation in the Franchise Ordinance, prohibiting a transfer of the general partner interest in the Debtor, was a restriction imposed by the City only within the Franchise Ordinance with the Debtor and is not a general limitation applicable to all ordinances of the City. The City granted unconditional consent, in the letter dated July 15, 2004, for the transfer of the general partner interest in Debtor to TVII. This consent must necessarily have included consent for the transfer under the Franchise Ordinance because Debtor's right to operate the entire System is dependent, in part, on its rights under the Franchise Ordinance.

Considering that the Debtor sought the City's consent to the transfer of its general partner interest and that the City gave "unconditional" consent upon which Debtor relied to continue operating the System, the City waived any right now to contest the 2004 assignment of the general partner interest in the Debtor. *See Cleveland v. Cleveland Elec. Illum. Co.*, 440 F.Supp. 193, 205 (N.D. Ohio 1976)

Having given its unconditional consent, the City is now equitably estopped to claim that the Franchise Ordinance, which it has never sought to terminate, is somehow void by virtue of the assignment it previously approved. *See, Pilot Oil Corp. v. Ohio Dep't of Trans.*, 102 Ohio

[11] Section 13.2 of the Lease defines Liquidated Damages to be the sum of $2,000,000 that is to be paid by the Tenant to the Landlord as compensation for any and all defaults if the Lease is terminated.

App.3d 278, 283, 656 N.E.2d 1379 (10th Dist. 1995) (citing *Baxter v. Manchester* (1940), 64 Ohio App 220, 18 Ohio Op. 77, 28 N.E.2d 672; *Cleveland Elec. Illum. Co.*, 440 F.Supp. 193, 205 (N.D. Ohio 1976); *Shapely, Inc. v. Norwood Earnings Tax Bd. of Appeals*, 20 Ohio App.3d 164, 485 N.E.2d 273 (1984)). "The doctrine of estoppel is applicable to municipal corporations where they have the power to act or contract . . . ." *Baxter v. Manchester*, 64 Ohio App. at 225, paragraph 2 of syllabus (holding that, in a situation involving a municipality's contract with an entity for water service, under a franchise ordinance, when the doctrine of estoppel applies to municipal corporations, "they may estop themselves by conduct, silence or acquiescence in the same way as natural persons."); *see also Five Oaks Neighborhood Improvement Ass'n v. Board of Zoning Appeals*, 1984 Ohio App. LEXIS 8841, *4-5 (2nd Dist., Feb. 27, 1984).

In this case, given that Debtor has continued to operate the System since the transfer of its general partner interest in 2004, it was not until after the Assumption Motions were filed that the City raised this issue. Debtor's operation of the System, for which the City contracted, is not interfering with the exercise of governmental functions and the interests of justice guide that the City should be equitably estopped to now claim this purported violation, if any, voids the Franchise Ordinance. Alternatively, because this was a restriction particular to this Franchise Ordinance, and not a restriction of general application to all City ordinances, the City could and did waive the requirement for an ordinance approving the transfer or should now be estopped to claim that Franchise Ordinance is no longer valid.

"It is well settled that a franchise or license agreement is an executory contract within the contemplation of 11 U.S.C. 365." *In re Tirenational Corp.*, 47 B.R. 647, 651 (Bankr. N.D. Ohio 1985) (examining assumability of a franchise agreement). As declared by the Ohio Supreme Court, a public utility franchise is construed to be a contract. *See Parks v. Cleveland Ry. Co.*,

124 Ohio St. 29, 177 N.E. 28 (1931) (citations omitted). Public utility franchises constitute contracts and are "evidenced by the ordinance adopted by the municipality and its acceptance by the utility." *See id.*, syllabus. The Franchise Ordinance in this case is a contract. In this case, there is no general ordinance by the City giving authority for any other entities to operate the System, just the specific Franchise Ordinance authorizing operation only by the Debtor.

The Lease, under both Sections 3.2(a) and 22, incorporates the Franchise Ordinance as part of the "whole, entire" contract between the City and the Debtor concerning the System. (*See* Lease at 3, 17 (§§ 3.2(a), 22).) Accordingly, in this context, the Lease and Franchise Ordinance must be read together because they are part of the same contractual relationship. "Where one instrument incorporates another by reference, both must be read together." *Fouty v. Ohio Dept. of Youth Servs.*, 167 Ohio App.3d 508, 528, 2006-Ohio-2957 {¶ 64}, 855 N.E.2d 909 (10th Dist. 2006), appeal not allowed, 2006-Ohio-5625. However, even if the Lease did not specifically incorporate the Franchise Ordinance, "[m]ultiple documents should be construed together if they are part of the same transaction." *Mantua Mfg. Co. v. Commerce Exch. Bank*, 75 Ohio St.3d 1, 5, 661 N.E.2d 161, 165 (1996) (citations omitted). In this respect, the recitals to the Franchise Ordinance expressly state that it was enacted by the City Council in relation to the City and the Debtor "entering into an Operating Lease Agreement in order to permit Akron Thermal to operate the System, pending closing of the transactions described in the Purchase Agreement." (*See* Franchise Ord. at 2-3.)

The Franchise Ordinance contains a specific provision on termination, requiring notice, an opportunity for a hearing and an ordinance to terminate the franchise. Thus, as of the Petition Date, even if the City is not estopped or deemed to have waived its right to require an ordinance to consent to the transfer of the general partner interest in Debtor, the Franchise Ordinance was

not terminated and remains "unexpired." Further, the City's contention that Debtor owes the Franchise Fee and must provide adequate assurance of payment of the Franchise Fee in order to assume the Lease confirms that the City has treated the Franchise Ordinance as being in place and valid, as part of the integrated, "whole, entire" contract.

As an "unexpired" contract, the question is whether the Franchise Ordinance, as part and parcel of the Lease, can be assumed under § 365. Again, if the City is not estopped or deemed to have waived the "material default" of not getting an ordinance approving the transfer of the general partner interest in Debtor, then this constitutes a pre-petition "non-monetary default" under the Franchise Ordinance. Under § 365(b)(1)(A), Debtor does not have to cure "non-monetary defaults" – defaults incapable of being cured – in order to assume the Lease. *In re Yardley*, 77 B.R. 643, 645 (Bankr. M.D. Tenn. 1987).

If the City is not deemed to have waived or to be estopped to assert the technical assignment default under Section 6 of the Franchise Ordinance and a cure of this technical assignment default were required, there would be no way for Debtor to force the City to enact the appropriate ordinance. However, in this circumstance, where Debtor is still the entity with which the City has the Franchise Ordinance, this provision is at best rightly viewed as a non-monetary default that, pursuant to § 365(b)(1)(A), Debtor does not have to cure. In the alternative, under § 365 the Debtor can assume the Franchise Ordinance despite the technical assignment restriction in the Franchise Ordinance.

In this circumstance, the assignment restriction in the Franchise Ordinance, which is specific to the Debtor and not found in an Ohio statute or the City Charter or Code, will not prevent Debtor from assuming the Franchise Ordinance. *See City of Jamestown, Tenn. v. James Cable Partners, L.P. (In re James Cable Partners, L.P.)*, 27 F.3d 534 (11th Cir. 1994); *see also*

In re Adelphia Communications Corp. 359 B.R. 65, 71-72 (Bankr. S.D.N.Y. 2007), Based upon the foregoing, Debtor is entitled under § 365 to assume the Franchise Ordinance.

h. Assumption of the License Agreements

The City has not made any arguments regarding termination of the License Agreements, nor of any amounts that need to be cured in order for Debtor to assume the License Agreements. As it appears said License Agreements are necessary to Debtor's operation of the System, and it appearing there are no cure obligations due, the Debtor is hereby authorized under § 365 to assume the License Agreements. [Debtor's Assumption Exhibits 7, 8 and 9].

i. Debtor Is Not Authorized To Reject Specified Supply Contracts.

Among other items, Debtor rejects Hot Water and Chilled Water Supply Contracts listed in Exhibit 8.2 to the Plan as "Schedule of Rejected Contracts." Items 2 and 3 of the Schedule of Rejected Contracts are as follows: Hot Water and Chilled Water Supply Contract dated November 17, 2000 and September 1, 2000 with the City for O'Neil's Parking Garage (the "City's Service Agreement"). Debtor's business judgment is that it can obtain more favorable terms for these contracts. The City contends that the result of Debtor's rejection of the City Service Agreement is that it will put Debtor in violation of Sub-Section 5.1(b) of Section 5 of the Lease and Section 10 of the Franchise Agreement because pursuant to those provisions, the rates charged to the City as Landlord, by the Debtor as tenant ".....shall in no event exceed the most favorable rates charged by Tenant to the class of customers' most similar to Landlord." The City complains that the Debtor does not state in its Plan, "the most favorable rates" charged by the Debtor "to the class of customers most similar to" the City.

Under § 365(d)(2), "at any time before the confirmation of a plan" the Debtor may reject an executory contract. 11 U.S.C. § 365(d)(2). Under § 365(a), the decision to reject a contract rests in the business judgment of the Debtor. 3 Collier on Bankruptcy ¶ 365.03[2] at 365-26 and

27 (15th ed. 2007) (footnotes omitted). Debtor argues that the City offered no evidence to support its arguments on this point, i.e., that there is a class of similar customers receiving a more favorable rate.

Normally the business judgment of a party identified by the Bankruptcy Code as having the right to exercise that judgment is entitled to significant deference from the bankruptcy court. However, in this instance, because the assumption of the Lease is so central to the Plan and because there is an unresolved question about whether authorizing the Debtor at this time to reject the City Service Agreement would be a breach of the Lease, the Court is not prepared to rule on this item now. While the Bankruptcy Code permits assumption or rejection of contracts in the plan context and this Plan does address this issue, there was simply no focus on this aspect of the Plan at the Confirmation Hearing. While approval or disapproval of such actions can occur within a confirmation decision, where the economic result of rejecting a particular executory contract is not central to the feasibility of the Plan, the Court views itself as having discretion to address this issue outside of the Confirmation Opinion. The Court needs to be satisfied that, in the exercise of its business judgment, Debtor has accounted for the possibility of having to address whether it is in immediate breach of the Lease that it is assuming and of the costs that might be incurred in the resolution of that issue. Debtor did timely raise its rejection decision, but is not authorized to reject the City Service Agreement at this time.

j. Conclusions of Law Regarding Feasibility

The Base Case projections for 2008 through 2012 are based upon "realistic and reliable assumptions which are capable of being met." *In re Ridgewood Apartments of DeKalb County, Ltd.*, 183 B.R. at 789. The Base Case projections indicate the Reorganized Debtor should have sufficient cash flow to pay its obligations under the Plan and to fund its operations. At the

Effective Date the equity will be contributed to fund Debtor's cure obligations with repsect to the Lease and to address other immediate payment obligatons under the Plan. Debtor's projected cash is expected to be more than adequate address the operational needs of the Reorganized Debtor and ATC and to service its future plan payments. Factors supporting this conclusion include the anticipated revenues of approximately $15.5 million, a minimal tax burden, debt service structured to match available cash, and expected EBITDA in excess of $2.0 million.

The Debtor is current on all post-petition obligations, including all rent, franchise fees, water and sewer charges and all other charges by the City. Debtor has managed to pay or reserve for the extraordinary professional expenses that have been incurred in its chapter 11 case. The diminution of such fees bodes well for its future prospects.

The Base Case projections demonstrate Reorganized Debtor will be able to perform into the future as well. The Court concludes that based on the entire record of this case, Debtor has established adequate assurance of future performance under the Lease, Franchise Ordinance and License Agreements. In this case, the pre-petition defaults will all be cured at the Effective Date. The Court concludes this is prompt cure of the pre-petition defaults

With regard to the matters presented in connection with the Debtor's Assumption Motions that were not decided in the Partial Opinion, based upon the evidence introduced during the hearings on the Assumption Motions, the post-hearing proposed findings of fact and conclusions of law, and the evidence introduced during the Confirmation Hearing, the Court finds that the Plan is feasible. Based upon evidence of Debtor's financial resources, Debtor has shown adequate assurance of future performance of its obligations under the Lease, Franchise Ordinance and related License Agreements, in accordance with § 365(b)(1)(C). Debtor has met all other applicable requirements under § 365(b). Accordingly, the Court hereby approves

Debtor's assumption of the Lease, Franchise Ordinance and related License Agreements under the requirements set forth in the Partial Opinion, and as discussed below.

During the course of this proceeding, management has shown it has the ability to profitably operate the Reorganized Debtor. Debtor has continuously operated during this Chapter 11 case even though it has paid in excess of $2.25 million in administrative costs. *See* Debtor's Exhibit 12. Based on all of the foregoing, the Court finds that the Plan is feasible and accordingly concludes that the Plan satisfies the requirement of § 1129(a)(11).

2. Debtor's Plan Does Not Violate The Absolute Priority Rule And Is Therefore Fair And Equitable Pursuant To Section 1129(b)(2)(B) Of The Bankruptcy Code

Section 1129(a)(8) requires for confirmation that each class of claims accepts the Plan or is not impaired under the Plan. Because there were impaired classes that did not accept the Plan, Debtor has sought confirmation of its Plan under § 1129(b), which permits confirmation notwithstanding failure to meet the § 1129(a)(8) requirement, "if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan."

Section 1129(b) provides that the Plan can be confirmed even if it has not been accepted by all impaired classes (as otherwise required by § 1129(a)(8)) as long as at least one impaired class of Claims, without the consideration of votes of insiders, has accepted it (§ 1129(a)(10)) and if the Plan "does not discriminate unfairly, and is fair and equitable, with respect to each class of claims" that is impaired under the Plan and has not accepted the Plan. 11 U.S.C. §§ 1129(a)(10) and 1129(b).

a. Absolute Priority Rule (§ 1129(b)(2)(B)(ii)) and New Value Exception

The City argues that Debtor's Plan violates the absolute priority rule and is therefore not fair and equitable pursuant to § 1129(b)(2)(B)(ii) of the Bankruptcy Code. Specifically, the City

contends (1) that Debtor's partners, TVII and its owners and Opportunity Parkway, LLC, as holders of equity interest junior to the City and the other unsecured creditors, will retain that equity in the Reorganized Debtor and receive property of a value which significantly exceeds the "new value" being contributed. (*See* City's PFFCL ¶¶ 328-37), and (2) that TVII is not paying equivalent value for the retained equity in the Reorganized Debtor (*See* City's PFFCL ¶¶ 338-49).

The absolute priority rule is contained in § 1129(b)(2)(B)(ii) and, as applicable in this case, provides that Debtor's equity holders cannot "receive or retain under the plan" any property "on account of" their old equity interests because the rejecting class of unsecured creditors will not be paid in full under the Plan. 11 U.S.C. § 1129(b)(2)(B)(ii). There is an exception or corollary to the absolute priority rule known as "new value" that has been recognized and approved by the Sixth Circuit Court of Appeals. *Teamsters Nat'l Freight Indus. Negotiating Comm. V. U.S. Truck Co., Inc.*, 800 F. 2d 581 (6th Cir. 1986); *see, Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 203 n.3 (1988); *see also, In re Economy Lodging Sys., Inc.*, 205 B.R. 862, 865 (Bankr. N.D. Ohio 1997); *In re Montgomery Court Apartments of Ingham County, Ltd.*, 141 B.R. 324, 343 (Bankr. S.D. Ohio 1992).

In order for the "new value" exception to apply – for old equity to retain the equity of the Reorganized Debtor – the new value must be "(1) in money or money's worth, (2) that is reasonably equivalent to the value of the new equity interests in the reorganized debtor, and (3) that is necessary for implementation of a feasible reorganization plan." *In re Beaver Office Prods., Inc.*, 185 B.R. 537, 542 (Bankr. N.D. Ohio 1995). If these elements are satisfied, then the absolute priority rule is not violated and the Plan is confirmable under § 1129(b)(2)(B)(ii). *In re Target Graphics, Inc.*, 372 B.R. 866, 872 (Bankr. E.D. Tenn. 2007) (citing *Bank of Am. Nat'l*

Trust and Sav. Ass'n v. 203 North LaSalle St. P'ship, 526 U.S. 434, 442, 119 S.Ct. 1411; *In re U.S. Truck Co.*, 800 F.2d at 588).

With regard to the second and third elements, the analysis "'involves looking at the need for the contribution and whether [the equity holder] paid a fair price for its interest.'" *In re WCI Steel, Inc.*, Ch. 11 Case No. 03-44662 (Bankr. N.D. Ohio Dec. 15, 2004), appeal dismissed, 338 B.R. 1 (N.D. Ohio 2005) (citing *In re U.S. Truck Co.*, 800 F.2d at 588; *In re Economy Lodging Sys., Inc.*, 205 B.R. at 865). There is no clear guideline by which to determine whether a contribution is "reasonably equivalent" and the determination "is factually intense and must be made on a case-by-case basis." *In re Montgomery Court Apartments of Ingham County, Ltd.*, 141 B.R. at 345. The value of the equity contributions must be compared to the value of the interests in the reorganized debtor that old equity is retaining. *See In re Crosscreek Apartments, Ltd.*, 213 B.R. at 548, n.32

The Debtor has the burden of proving that TVII and its partners are not receiving the Reorganized Debtor's equity "on account of " its existing equity interest, but rather, on account of new value in "money or money's worth" equal or equivalent to the value of the Reorganized Debtor.

i. Findings of Fact Regarding Valuation Methodologies

For the purpose of examining the "reasonably equivalent" value of new equity contributions, in general, the discounted cash flow ("DCF") analysis is most relevant because it gives an overall value reduced to present value, roughly as of the effective date of the plan – the date on which the old equity holders will pay for and retain their equity interests in the Reorganized Debtor. The DCF analysis is described as an estimate of:

> the present value of projected future cash flow of the business that is hypothetically available to creditors but not paid to them, and

> then applies a discount rate to projected future cash flows to determine a present value of the company.

In re Am. Homepatient, Inc., 298 B.R. 152, 175-76 (Bankr. M.D. Tenn. 2003).

In some chapter 11 cases, such as those involving publicly traded companies, the use of a market multiple, applied to a comparable company analysis or comparable transaction analysis, may also be helpful. Because the Debtor's estate consists chiefly of the right to operate leased assets through August 14, 2017, use of market multiples and comparable transaction analysis was simply not available in this case. In a case like this where the market was not or cannot be tested, plan confirmation centers on enterprise value derived by analyzing DCF data.

The use of a market multiple depends upon finding adequate comparables. *See Exide Techs.*, 303 B.R. at 61-63. If there are no adequate comparables because of the unique issues facing a closely-held company, then the market approach to valuation is not applicable. *See DCHC Liquidating Trust v. HCA Inc. (In re Greater Southeast Cmty. Hosp. Corp.)*, 2008 WL 2037592, at *8-11. *In re EBP, Inc.*, 172 B.R. 241, 247 (Bankr. N.D. Ohio 1994); *see also Chartwell Litig. Trust v. Addus Healthcare, Inc. (In re Med Diversified, Inc.)*, 334 B.R. 89 (Bankr. E.D.N.Y. 2005).

Moreover, the Sixth Circuit Court of Appeals has recognized that DCF analysis is "a well-recognized methodology for determining a business's going concern values." *In re Valley-Vulcan Mold Co.*, 2001 WL 224066, No. 99-4129 (6th Cir. Feb. 26, 2001) (cited in *Kool, Mann, Coffee & Co. v. Coffee*, 300 F.3d 340, 362 (3rd Cir. 2002)). Furthermore, in this Court's unreported opinion issued in the *In re WCI Steel, Inc.* case, the Court examined the formulation of a confirmable new value plan and concluded that in order to determine the value of the equity in a reorganized debtor, it must analyze "the enterprise value of the reorganized debtor as of the hypothetical effective date of the Debtors' Plan" and that, in analyzing the "enterprise value,"

"methodologies which rely on cash flow analysis are more persuasive to the Court in light of [the old equity holder's] proposal to retain the Debtors' current equity." *See In re WCI Steel, Inc.*, Ch. 11 Case No. 03-44662, *Id.* at p. 13, ¶ A1.

Based on the unique set of facts and risks facing this Debtor, the Court concludes that use of market multiples is not helpful and the only way to provide a reliable estimate of value of the Reorganized Debtor is by use of the DCF method. Here no credible evidence utilizing the market based approach was presented. In large part this reflects that the Debtor operates the Leased Facilities as a result of a leasehold interest that has a term of less than nine years. It does have a purchase option, but one that cannot be transferred without the consent of the lessor, a consent that cannot be easily assumed. When valuation data based on market transactions cannot be developed because of the absence of comparable transactions, market based methods are not useful, and other valuation methods must be utilized. *See Exide Techs.,* 303 B.R. 48.

ii. Findings of Fact Regarding Enterprise Value

Debtor, the City, and the UCC each offered their own experts to testify about Akron Thermal's enterprise value. Debtor presented the testimony of Mr. Fensterstock. The City called Robert Turner, a Certified Public Accountant ("CPA") and principle of Apple Growth Partners. The UCC called Mark Bober, a CPA and Certified Valuation Analyst and principal of BMF Advisors, LLC ("BMF"), a full service public accounting firm. The testimony and methodologies which relied on a cash flow analysis were more persuasive to the Court in light of TVII's proposal to retain the Debtor's current equity.

(a) Jason Fensterstock

Mr. Fensterstock prepared a discounted cash flow valuation tied to the Base Case Projections.[12] Because the Debtor's Lease with the City expires on August 15, 2017, Mr. Fensterstock concluded that the Reorganized Debtor's value is limited to the discounted present value of its free cash flow during the remaining term of the Lease.[13] *See* Debtor's PFFCL ¶¶ 198-199

Mr. Fensterstock first calculated the projected cash flow through 2017. This is taken from the Base Case projections. Mr. Fensterstock then calculated what he believed to be an appropriate Weighted Average Cost of Capital ("WACC"), which represents the cost of all financing sources in the entity's capital structure. Mr. Fensterstock's experience was that equity investors expect a return of 22 to 25% in such circumstances. Mr. Fensterstock's experience was also that the cost of debt is in the range of 5 to 7%. Mr. Fensterstock testified that he believed a capital structure of one-third equity and two-thirds debt was appropriate. These factors were then blended to derive an appropriate WACC. Based on the foregoing, Mr. Fensterstock concluded that a range of 8 to 12% for the WACC was appropriate. *See* Debtor's PFFCL ¶¶ 199-201.

Mr. Fensterstock's discounted cash flow analysis is attached to the First Amended Disclosure Statement as Exhibit E. Exhibit E provides a range of values for Reorganized Debtor, using discount rates from 8% to 12%. Exhibit E calculates a net present value of the future cash flows in the range of $4,670,000 to $5,622,000 presuming 100% tax payments and $6,295,000 to $7,491,000 presuming only partial tax payments. Obligations under the Plan were then subtracted to arrive at the equity value of the Reorganized Debtor. Those calculations resulted in

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[12] Mr. Fensterstock testified that because of the size of Debtor and its unique challenges (customer concentration, historical operating losses, issues with the EPA and limited growth prospects), he did not believe there were any truly comparable companies or transactions and therefore he concluded that the discounted cash flow was the only appropriate method for valuing the Reorganized Debtor.

[13] Mr. Fensterstock testified that he considered the purchase option, but concluded it was of very little value.

a range of $96,000 to $1,048,000, presuming 100% payment of Debtor's taxes, and $1,721,000 to $2,917,000, presuming Debtor need only pay part of the taxes due to the contributions of TVII, as the value of the equity in the Reorganized Debtor. *See* Debtor's PFFCL ¶¶ 201-2

(b) Robert Turner

Mr. Turner prepared a report dated August 20, 2008, marked as City Exhibit G. Mr. Turner prepared a second document dated September 5, 2008 marked as City of Akron Exhibit V. Neither of Mr. Turner's reports had merit or probative value. In this case, the City's expert did not use a methodology deemed relevant and reliable by the Court for purposes of examining the reasonably equivalent value of the contribution by TVII. Mr. Turner's September 5, 2008 Report ("Turner Report") has two fundamental flaws.

First, Mr. Turner's Report is not a valuation. Mr. Turner fails to consider the other methods of valuation (discounted cash flow and asset approach). Instead, what he has performed is simply a calculation of some type, limited to a narrow focus on alleged market multiples. The Turner Report attempts to perform calculations based upon the guideline transactions and guideline public company methods. The failure to perform a discounted cash flow analysis renders his Report and testimony of little use to the Court.

Second, Mr. Turner did not testify as to the fair market value of the Reorganized Debtor. Instead, Mr. Turner testified only that TVII was receiving a "potential premium" or "incremental potential value" if the purchase option were exercised and the facilities then sold. Whatever he meant by this analysis, it is not helpful to determine the fair market value of the Reorganized Debtor.

Mr. Turner was unable to place the Turner Report in any category of final valuation presentation techniques recognized by his field. His report lacked any credibility.

(c) Mark Bober

Mr. Bober testified that in assessing the value of Debtor, he considered all three valuation methods: discounted cash flow, asset approach and market approach (which considers guideline public companies and guideline transactions). He first undertook this analysis in providing assistance to the UCC as it evaluated the Plan. Mr. Bober testified that he concluded that the asset approach and market approach were not relevant to his analysis.

Mr. Bober testified that in early September 2008, he was asked to update his work. Mr. Bober prepared a schedule which sets forth his discounted cash flow approach in the form of UCC Exhibits 1 and 2. Based upon the review and input from David Wehrle, Mr. Bober utilized the Debtor's Base Case cash flow projections with certain modifications. *See* Debtor's PFFCL ¶¶ 219-22. Mr. Bober then calculated the appropriate WACC. Mr. Bober examined the WACC on an after-taxation basis because taxes had already been deducted from the projected cash flow. Mr. Bober calculated the WACC assuming a capital structure of 60% debt and 40% equity. *See* Debtor's PFFCL ¶¶ 224-26. Based on this analysis, Mr. Bober applied a 12% discount rate to the projected cash flow through 2017. He assumed a terminal growth rate of 2%. Thus, he applied a 10% discount rate for the terminal period (and assumed the purchase option is exercised in 2017 at a cost of $5 million, which he deducted from the terminal period valuation), resulting in a value of the equity of the Reorganized Debtor of $1,638,095. *See* Debtor's PFFCL ¶¶ 227.

Based on the above-stated factors, the Court finds that the discounted cash flow method is the only reliable method for valuing the Reorganized Debtor. The Court further finds that the testimony of the experts called by Debtor and the UCC are relevant, reliable and credible. Based

upon that testimony, the Court has found that the equity value of the Reorganized Debtor is in the range of $2 million.

c. Findings Regarding TVII's Proposed New Value Equity Contribution

The Court must now examine the value of what is being contributed to determine if it is "reasonably equivalent" to the value of the Reorganized Debtor and necessary for an effective reorganization.

As consideration for their ownership Interests in the Reorganized Debtor, TVII proposes that it will contribute the items to the Debtor:

a. TVII will contribute Three Million Dollars ($3,000,000) to the Reorganized Debtor as an equity infusion.

b. On the Effective Date, TVII will provide an unsecured line of credit to the Reorganized Debtor in the amount of Two Hundred Fifty Thousand Dollars ($250,000). Reorganized Debtor will execute a Note substantially in the form as Exhibit 7.1 to the Plan. See Debtor's Modification to Second Amended Plan of Reorganization for Akron Thermal, Limited Partnership Dated July 14, 2008, filed September 10, 2008 [Docket No. 523].

c. TVII and its partners will (i) contribute operating losses from entities unaffiliated with ATLP to offset cancellation of indebtedness income occasioned by the Plan; and (ii) until the earlier of December 31, 2013 or the date the debt issued under the Plan has been repaid, forego an amount equal to two thirds (2/3) of the tax distribution to which they would otherwise be entitled under the Partnership Agreement. Further, as described in section X(F) of the Plan, TVII has agreed to defer tax distributions if, and to the extent that, fixed charge coverage drops below 1.0.

d. TVII will contribute the income and earnings of Akron Thermal Cooling, LLC to the Reorganized Debtor.

e. TVII will waive its pre-petition claims against ATLP, except for the sum of $75,000 which will remain secured but will be subordinate to the Creditors' Trust Note. TVII asserts claims totaling in excess of $10 million against ATLP.

See Disclosure Statement at ATLP-vii-viii; Plan at 18-19, § 7.1; Modifications to Plan [docket No. 523].

With respect to items (a), (b), and (c) above, the Court is persuaded by the testimony of Mr. Fensterstock as to the value of each of these components. The equity contribution of $3 million and the unsecured line of credit are certain, thus it is appropriate to value those components at more than $3 million. Contrary to Mr. Fensterstock's assertion, the line of credit amount should not be treated as new value in and of itself. Rather, it is the cost saving that the Reorganized Debtor would realize in not having to find such financing from a source that would likely charge fees of a material amount. The Court does not undertake to quantify that cost savings as no testimony was adduced in that regard; the Court simply notes that there is a modicum of new value from the availability of the line of credit.

Mr. Fensterstock testified that the "value" of the tax deferral is at least $1.5 million. This analysis is set forth in Exhibit E to the First Amended Disclosure Statement and Mr. Fensterstock's report (Debtor's Exhibit 10). The agreement to forego full tax distributions was credibly valued at approximately $1.5 million. *See* Debtor's PFFCL ¶¶ 231-33.

With respect to item (d), the City contends that the contribution of the income and earnings of ATC to the Reorganized debtor can be given no value since all of the operating expenses and liabilities of that entity will be borne by the Reorganized Debtor. The Court agrees with the City. The obligations of ATC have been included in all financial statements and projections. The business of ATC and that of the Debtor have been operated as a single entity for all purposes, save legitimate state tax reasons. Most telling, ATC depends upon use of the Leased Facilities. Therefore, the revenue from ATC cannot be credited to TVII as a separate and additional contribution to the reorganization of the Debtor. *See* City's PFFCL ¶¶ 274-75. .

With respect to item (e), Mr. Fensterstock valued the waiver of TVII's secured and unsecured claims of over $1.1 million. *See* Debtor's PFFCL ¶234. The Court agrees with the City's analysis that TVII's waiver of its alleged secured claim does not constitute additional "new value" for equity in the Reorganized Debtor. *See* City's PFFCL ¶¶ 264-274; 338-341.

Based on the foregoing, the sum total of the contributions is in the vicinity of $4.5 million. Given that the equity of the Reorganized Debtor is valued at approximately $2,000,000, the equity contribution of $3,000,000 by itself exceeds the value of the Reorganized Debtor.

d. Findings Regarding Market Test of New Value Equity Contribution

The Supreme Court has held that plans affording junior interest holders with exclusive opportunities free from competition and without the benefit of market valuation fall within the prohibition of § 1129(b)(2)(B(ii). *203 North LaSalle*, 526 U.S. at 458. In this case, the Debtor ceased to have the benefit of exclusivity as of March 16, 2008. The evidence adduced at the Confirmation Hearing established that thereafter, the City did engage in negotiations with the UCC about a possible plan.

This case presents a highly unusual circumstance. The remaining term of the Lease is less than nine years, thus rendering reliable comparables for valuation of the Reorganized Debtor unavailable. Further, the Franchise Ordinance, which is necessary to operate Debtor's business, prohibits assignment without the City's consent, making it difficult, if not impossible, for Debtor to market the equity interests in the Reorganized Debtor without the consent of the City.

As stated, in this case Debtor's exclusive period to file a plan of reorganization expired on March 15, 2008. Despite the fact that the City negotiated with the UCC about the possibility that the City would file a plan, the City did not do so. If any party desired to contribute more than TVII will contribute under the Plan, they have had a full and fair opportunity to make such a

proposal.[14] The fact that no other party has made any such proposal to acquire the equity interests in Debtor is illustrative of the fact that TVII is the only party willing to contribute the capital necessary to fund a reorganization in this case. By allowing exclusivity to expire and thereby giving the City and any other interested party the opportunity to propose a competing plan, this Debtor did what was necessary to permit competition for control of the Reorganized Debtor or some other form of chapter 11 plan.

Accordingly, on the facts and circumstances of this case, any concerns over market testing are resolved by the expiration of the exclusivity period, the absence of any competing plans of reorganization, and the fact that TVII's equity contribution is unmatched, very substantial, and necessary to the success of the reorganization.

e. Conclusions of Law Regarding Absolute Priority and New Value

TVII is contributing equity of $3 million as well as certain other items, which when totaled, have a value of more than $4.5 million. The equity contribution of $3 million proposed by TVII is obviously in "money or money's worth." This will be used to pay the cure obligation of the City (approximately $2.5 million), pay the initial payment to the State of Ohio ($150,000) and pay other obligations under the Plan. Thus, the first element of the new value exception is clearly satisfied. *See In re WCI Steel, Inc.*, Ch. 11 Case No. 03-44662, at p. 23 (holding that "[a] cash contribution clearly is money or money's worth" when it is being distributed to creditors).

The remaining items being contributed are likewise of real benefit to the creditors. The agreement to forego tax distributions enhances future cash flow, thereby allowing more certainty of payment to the State of Ohio and unsecured creditors. The claims being waived likewise

[14] Noting the provisions of the Lease on the subject of the City's right to approve any new operator, as a practical matter, any other interested party would have had to work with the City to develop a feasible competing plan.

allow for greater recovery to creditors. This entire package is beneficial to the Reorganized Debtor.

The second element of the new value exception is also clearly satisfied in this case. Without the equity infusion by TVII, Debtor will not be able to cure the defaults under the Lease and would not be able to fund distributions to the unsecured creditors, both of which are necessary to this reorganization. With the equity infusion, Debtor will have enough resources to meet these obligations and has demonstrated that it will be able to meet its other expenses going forward.

Based upon the testimony offered by both Debtor's expert and the UCC's expert regarding the discounted cash flow valuation of the Reorganized Debtor, and subtracting the obligations to be paid under the Plan, it is apparent that TVII will be making more than a "reasonably equivalent" contribution of new value in relation to the new equity in the Reorganized Debtor that TVII and Opportunity Parkway will retain under the Plan.

This Court has found that the value of the equity interests to be acquired under the Plan are worth approximately $2 million. Considering that TVII's equity contribution is $3 million, and in excess of $4.5 million when other factors are considered there is no question this contribution meets and exceeds the threshold of being "reasonably equivalent." *See e.g.*, *In re Crosscreek Apartments, Ltd.*, 213 B.R. at 548, n.32 The Debtor has also established that the contributions are necessary for an effective reorganization.

The valuations of the Reorganized Debtor that were presented by both Debtor's expert and the UCC's expert, based on the discounted cash flow method, when coupled with the absence of any competing plans or offers to purchase the equity in the Reorganized Debtor, show that the old equity holders are providing fair value through the new value contribution. Based

upon the foregoing, Debtor has satisfied its burden to show that the Plan complies with the new value exception, corollary or exemption to the absolute priority rule with regard to the Claims in Class 3.2 of the Plan.

3. The Non-Debtor Third Party Releases Are Permitted

In addition to seeking approval of Debtor's waiver of all claims and causes of action against the Directors and Officers of TVII, ATC and Opportunity Parkway, relying upon Bankruptcy Rule 9019, Article XII of the Plan provides for the discharge of Claims or other debts as against the Debtor, TVII, Opportunity Parkway and ATC, and an injunction as to all Claims or other debts, liabilities or terminated Interests as against "the Debtor, Reorganized Debtor, the Creditors' UCC, its members in their capacity as members but not in their individual capacities, and all of their respective partners, officers, employees, agents, counsel, advisors and representatives." (*See* Plan at p. 31-32, §§ 12.2, 12.3 and Supplemental Modifications filed September 26, 2008, Docket No. 528).

Bankruptcy courts have jurisdiction under Section 105(a) to enjoin creditors from pursuing causes of action against the general partner of a debtor limited partnership. *Northlake Bldg. Partners v. Northwestern Nat'l Life. Ins. Co. (In re Northlake Bldg. Partners)*, 41 B.R. 231, 233 (Bankr. N.D. Ill. 1984) (citing *Landmark Air Fund II v. Bancohio Nat'l Bank (In re Landmark Air Fund II)*, 19 B.R. 556, 559 (Bankr. N.D. Ohio 1982). This is especially the case "in the context of a *partnership* bankruptcy," in which "the courts are particularly concerned with reference to the actions which a partnership creditor might commence against individual partners." *Id.* at 234. Courts have held that in order to assist the partnership in reorganizing its affairs, injunctive relief may be proper to prevent creditors "from proceeding against the general partners individually." *Id.* (citing *Old Orchard Inv. v. A.D.I. Distributors (In re Old Orchard Inv. Co.),* 31 B.R. 599, 602-603 (W. D. Mich.1983)).

A permanent injunction enjoining creditors from pursuing the partners of the Debtor, a limited partnership is especially necessary and compelling when participating partners would have no incentive to make the large contributions necessary to establish feasibility of the Plan if the partners remained liable for claims related to the Debtor's affairs. *In re Heron, Burchette, Ruckert & Rothwell*, 148 B.R. 660, 667 (Bankr. D. Colo. 1992). Such an injunction is also compelling when it is necessary to "provide maximum payout and fair distribution under the plan" and when the injunction is a condition precedent to confirmation of the plan. *Id.* at 667, 689. Further, Bankruptcy Rule 3016(c) expressly contemplates a plan providing "for an injunction against conduct not otherwise enjoined under the Code[.]" Fed. R. Bankr. P. 3016(c).

The Sixth Circuit Court of Appeals, though not in the context of a partnership bankruptcy, has considered and approved the use of a permanent injunction barring both consenting and non-consenting creditors' claims against non-debtor parties. *See Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 658 (6th Cir. 2002) (determining that "enjoining a non-consenting creditor's claim against a non-debtor is 'not inconsistent' with the Code . . ."). In surveying the various factors examined in other circuits, the Sixth Circuit held that "when the following seven factors are present, the bankruptcy court may enjoin a non-consenting creditor's claims against a non-debtor . . . ." *Id.* Those factors are as follows:

> (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate;
>
> (2) The non-debtor has contributed substantial assets to the reorganization;
>
> (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect

suits against parties who would have indemnity or contribution claims against the debtor;

(4) The impacted class, or classes, has overwhelmingly voted to accept the plan;

(5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction;

(6) The plan provides an opportunity for those claimants who choose not to settle to recover in full; and

(7) The bankruptcy court made a record of specific factual findings that support its conclusions.

Id. (citing *In re A.H. Robins Co.*, 880 F.2d 694, 701-02 (4th Cir. 1989); *MacArthur v. Johns-Manville Corp.*, 837 F.2d 89, 92-94 (2d Cir. 1988); *In re Continental Airlines*, 203 F.3d 203, 214 (3d Cir. 2000).

More recently, the Seventh Circuit Court of Appeals has determined that "whether a release is 'appropriate' for the reorganization is fact intensive and depends on the nature of the reorganization." *In re Airadigm Commc'ns, Inc.*, 519 F.3d at 657. When the discharge and injunction provisions proposed relate to unknown potential claims and not to any known claims, there are certain factors, such as four (4), five (5) and six (6) identified in the *Dow Corning Corp.* analysis above that are not applicable. With regard to the remaining *Dow Corning Corp.* factors, the discharge and injunction provisions in the Plan are wholly consistent.

In this case, Debtor is not seeking a release or injunction as to any guarantees of Debtor's indebtedness, nor is Debtor seeking to discharge or enjoin any presently known claims against the released parties. The discharge and injunction provisions exist only to ensure the financial stability of the Debtor and, therefore, such discharge and injunction are in the public interest because they will assist the Debtor to continue to successfully operate and provide utility service

to its customers. *See e.g., In re Litchfield Co. of S.C. Ltd. P'ship*, 135 B.R. 797 (W.D.N.C. 1992). In this circumstance where TVII and its affiliates are making significant financial contributions to fund the Plan, the discharge and injunction as to non-debtor partners and affiliates is justified. *See e.g., In re Karta Corp.*, 342 B.R. 45 (S.D.N.Y. 2006). Without the discharge and injunction provisions, TVII will not contribute the equity infusion, line of credit and other money's worth of value that are necessary for the Plan to work, and to avoid a liquidation in which the creditors will no doubt receive less than under the confirmed Plan.

4. Conditions Precedent

Under Article XIII of the Plan, there are conditions to both confirmation and to the Effective Date.

a. Conditions to Confirmation

As set forth in the Plan Modifications, Debtor has removed the condition to confirmation set forth in sub-part (d) of Section 13.1 of the Plan, regarding satisfaction with respect to the sewer credit litigation. The Court orally ruled on this matter and subsequently entered an Order Re: Motion for Modification of Adequate Assurance Payment [Docket No. 513] on August 26, 2008, whereby the Court determined that it has jurisdiction over the sewer credit matter under Section 366 of the Bankruptcy Code, but for the reasons stated in its oral ruling the Debtor's motion is denied, but Debtor is not barred from revisiting the issue in the future.

The remaining matters set forth in sub-parts (a), (b) and (c) of Section 13.1 of the Plan, concerning approval of the Disclosure Statement, a Confirmation Order in form and substance acceptable to the Debtor, and entry of an Order approving Debtor's assumption of the Lease, Franchise Ordinance and the related License Agreements, will be fully satisfied by the entry of a confirmation order.

b. Conditions to Consummation

The two conditions to the Effective Date of the Plan are set forth in Section 13.2 of the Plan. In short, they are (1) that the Confirmation Order has become a Final Order, and (2) any approvals or consents required by the PUCO have been obtained. Each of the conditions may be satisfied or waived in accordance with Section 13.3 of the Plan, by Debtor's filing a written notice of such waiver with the Court. Both are reasonable and appropriate in this case.

CONCLUSION

For the reasons stated above, the Court confirms the Debtor's Plan. A judgment entry consistent with this Opinion will be entered separately.

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